COURTS OF REQUESTS,

THEIR JURISDICTION AND POWERS,

UNDER THE

"ACT TO AMEND THE LAW OF INSOLVENCY, BANKRUPTCY AND EXECUTION,"

[7 & 8 VICT. c. 96;]

AND THE

"ACT FOR THE BETTER SECURING THE PAYMENT OF SMALL DEBTS,"

[8 & 9 VICT. c. 127.]

The Third Edition.

BY

DAVID DEADY KEANE, Esq.

OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW.

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Keane

COURSE OF REQUESTS

AND

QUESTIONS AS TO NOTES

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PREFACE

TO THE THIRD EDITION.

In preparing this edition for the press, I have been led to reflect on the difficulties which the rules of evidence oppose to the easy and cheap operation of the 8 & 9 Vict. c. 127, s. 1. It appears to me that those difficulties might be removed by an act that should render service by post, in the manner prescribed by the 7 & 8 Vict. c. 33, s. 6, sufficient service of a summons, and give a short statutory form, applicable to every court, of the certificate of a judgment.

D. D. K.

51, Lincoln's-Inn-Fields,
October 29, 1845.

PREFACE

TO THE SECOND EDITION.

THIS edition differs from the former by the introduction of a chapter that treats of the "Act for the better securing the Payment of Small Debts," (8 & 9 Vict. c. 127,) and the insertion of that Act in the Appendix. That measure, I firmly believe, will prove signally advantageous to the community, both by ensuring the ultimate payment of small debts, and elevating the character of the humble man. When it shall once be well understood that the fact of imprisonment for debt is the judicial affirmation of fraud in contracting a debt, or culpable obstinacy in refusing to pay it, the right-minded among the operative classes will shrink from the debtor's prison, as now they do from that of the felon. On the other hand, persons belonging to that class of debtors who have gone to prison for the purpose, to use their own phraseology, of paying a debt, will find that imprisonment will not extinguish it, nor relieve them from the liability to further imprisonment, if they shall have the means of satisfying the creditor.

It is much to be lamented that there should have been added to the clause which empowers the Queen to enlarge the jurisdiction of Courts of Requests, a provision that confines to its present limits the authority of the commissioners of those courts over debts and demands. It is somewhat unreasonable to give to commissioners jurisdiction over the much more complex questions of fact that will be raised under the first section, and to refuse them cognizance of the more simple questions of debt or no debt that will be brought under discussion by the operation of the ninth

section. They who know how much the vigilance of the bar contributes to the efficiency of the bench, will be disposed to think that if the effect of this provision be to deter commissioners from being present at proceedings under the enlarged jurisdiction, it will be a serious and public misfortune. I entertain the hope, however, that this provision will be repealed in the next session of Parliament; and I do not doubt but that the courtesy of the Judges to be appointed to the several courts will in the mean time apply the fitting remedy.

D. D. K.

51, LINCOLN'S-INN-FIELDS,
August 20, 1845.

OF THE POWERS CONFERRED ON COURTS OF REQUESTS BY ss. 59—68 OF THE STATUTE 7 & 8 VICT. c. 96.

CHAPTER I.

ON THE POWER OF COURTS OF REQUESTS TO IMPRISON, UNDER SECTION 59 OF THE STATUTE 7 & 8 VICT. C. 96.

THE words of the 57th section of the statute 7 & 8 Vict. c. 96, "An Act to amend the Law of Insolvency, Bankruptcy, and Execution," are these:—"And whereas it is expedient to limit the present power of arrest upon final process; be it enacted, That from and after the passing of this Act no person shall be taken or charged in execution upon any judgment obtained in any of Her Majesty's superior courts, or in any county court, court of requests, or other inferior court, in any action for the recovery of ANY DEBT wherein the sum recovered shall not exceed the sum of twenty pounds, exclusive of the costs recovered by such judgment." If then the plaintiff in an action for the recovery of a *debt*, brought in any of Her Majesty's superior courts, or in any county court, *court of requests*, or other inferior court, shall recover a sum that does not exceed the sum of twenty pounds, he will not be able to enforce the judgment by taking or charging in execution the person of the defendant. Herein, it must be borne in mind that the prohibition only extends to the taking or charging in execution; it leaves untouched all the other powers of the courts named, even that of making an order that the defendant be taken and detained in execution.

The 58th section of the statute 7 & 8 Vict. c. 96, made provision for the discharge from prison of persons in execution at the time of passing that Act, upon any judgment obtained in any of the courts described in section 57, for the recovery of any debt wherein the sum recovered shall not exceed the sum of twenty pounds, exclusive of the costs recovered by such judgment, in these terms:—

"And be it enacted, That all persons in execution at the time of passing this Act, upon any judgment obtained in

any of the courts aforesaid in any action for the recovery of any debt wherein the sum recovered shall not exceed the sum of twenty pounds, exclusive of the costs recovered by such judgment, shall and may, upon the application of every such person or persons for that purpose, made at any time after the passing of this Act, to a judge of one of Her Majesty's superior courts of law at *Westminster*, or to the court in which such judgment shall have been obtained, to the satisfaction of such judge or court, be forthwith discharged out of custody as to such execution by an order of such judge or court: Provided always, that if it shall happen that any such discharge shall have been unduly or fraudulently obtained upon any false allegation of circumstances, which, if true, might have entitled the prisoner to be discharged by virtue of this Act, such prisoner shall, upon the same being made to appear to the satisfaction of the judge or court by whose order such prisoner shall have been so discharged, be liable to be again taken in execution, and remanded to his former custody by an order of such judge or court: Provided also, that no sheriff, gaoler or other person whatsoever shall be liable as for the escape of any such prisoner, in respect of his enlargement during such time as he shall have been at large by means of such his undue discharge as aforesaid: Provided also, that, for and notwithstanding the discharge of any debtor or debtors by an order of any such judge or court in manner aforesaid, the judgment whereupon any such debtor or debtors was or were taken or charged in execution, shall nevertheless remain and continue in full force to the intent and purpose that the judgment creditor or creditors may have and take remedy and execution upon every such judgment against the property and effects of any such debtor or debtors, in such manner and form as such creditor or creditors otherwise could or might have done in case such debtor or debtors had never been taken or charged in execution upon such judgment; and it shall be lawful for such creditor or creditors to have and take such remedy and execution."

It has been suggested that if in an action for the recovery of a sum exceeding twenty pounds, the defendant were to pay into court a sum which should so reduce the amount claimed that there only remained in dispute a sum less than twenty pounds, the plaintiff would have no remedy against the person of the defendant for the remainder of the debt. It is, however, conceived that this view of the case is not correct, inasmuch as the abolition of arrest has relation to the amount recovered in the action, and not to the sum awarded by the jury, which is always exclusive of the money paid into court. But the money so paid into court is clearly a part of the sum recovered in the action, and

consequently has not the effect of reducing the debt below twenty pounds, so as to deprive the plaintiff of his remedy against the person of the defendant.

The language of the 59th section is this :—

"Provided always, and be it enacted, That if at any time it shall appear to the judge who shall try such cause, being either a judge of one of the superior courts, or a barrister or attorney-at-law, that the defendant, in incurring the debt or liability which may be the subject of demand, has obtained credit from the plaintiff under false pretences, or with a fraudulent intent, or has wilfully contracted such debt or liability without having at the same time a reasonable assurance of being able to pay or discharge the same, or shall have made or caused to be made any gift, delivery, or transfer of any personal property, or shall have removed or concealed the same with an intent to defraud his creditors or any of them, it shall be lawful for such judge, if he shall think fit, to order that such defendant may be taken and detained in execution upon such judgment in like manner and for such time as he might have been if this Act had not been passed, or for any time not exceeding six calendar months in any case in which the time for which a person taken in execution under process issuing out of any such court could lawfully be detained in custody, according to the constitution of the said court, before the passing of this Act, is less than six calendar months, whether or not execution against the goods and chattels of such defendant shall have issued as hereinafter provided."

Thus, then, is a power given to order that a defendant *may* be taken and detained in execution "upon such judgment;" in short, a power to suspend the prohibition virtually imposed by sect. 57, and to enlarge, in some cases, the effect of the powers to the operation of which sect. 57 was a bar. This power is to be exercised, under certain conditions, by a judge possessing certain qualifications. Let us now consider ordinally the several clausules of which the section is made up.

If at any time.

In attempting to fix the earliest time that is indicated by these words, we must begin by determing the act which the section renders lawful. That act is, an order by the judge that the defendant "may be taken and detained in execution upon such judgment," that is, upon a judgment obtained in some action for the recovery of a debt wherein the sum recovered shall not exceed the sum of twenty pounds, exclusive of the costs. Further, the order may be for the taking and detaining in execution "in like manner . . . . as

he might have been if this Act had not been passed." At whatever time, then, the application for the order be made, the order itself cannot take effect until such time as the defendant could have been taken and detained in execution upon such judgment, if this Act had not been passed. From this it follows, not only that the exercise of this power is not limited to the day of trial, but that, as an opportunity for satisfying the judgment must be given to the defendant, who is not bound to attend the trial prepared to satisfy it, the exercise of such power cannot possibly take place on that day. Express care has been taken by the legislature to guard against the supposition, that the issue of execution against the goods and chattels of the debtor was intended to be a substitute for the more stringent remedy which this section empowers the judge to apply, or a bar to the application of it. The concluding words of the section are, "whether or not execution against the goods and chattels of such defendant shall have issued as hereinafter provided."

Now the 60th section provides for the issue of execution in these terms:—

"And be it enacted, That whenever the judge of any such court shall have made an order for the payment of money, the amount shall be recoverable, in case of default or failure of payment thereof forthwith, or at the time or times and in the manner thereby directed, by execution against the goods and chattels of the party against whom such order shall be made; and the clerk of the said court, at the request of the party prosecuting such order, shall issue, under the seal of the court, a writ of *fieri facias*, as a warrant of execution to one of the bailiffs of the court, who by such warrant shall be empowered to levy, by distress and sale of the goods and chattels of such party within the jurisdiction of the said court, such sum of money as shall be so ordered, and also the costs of the execution; and all constables and other peace officers within their several jurisdictions shall aid in the execution of every such warrant."

Thus the legislature has supposed that the court will make an order for the payment of the money recovered, or do some act equivalent to making such an order; and that such order will direct the time or times and the manner of payment. If there be not any specific directions, then, as a matter of course, payment of the whole amount must be made forthwith. Until, then, the order shall have been served, or something equivalent to service of it have been done, and the time or times for payment in the manner by the order directed,—if specific direction there be,—shall have elapsed, the defendant cannot be taken and detained in execution upon such judgment. Unless, therefore, a judge should think fit to try the question of fraud pro-

visionally, in anticipation of non-payment, the day of the trial cannot be the day on which a judge would exercise the powers conferred upon him by section 59.(*a*) It would be harsh, indeed, to call upon a defendant who comes prepared to argue the question of debt or no debt, to argue also, in the necessary absence of witnesses and want of documents—for the proceeding would not be a matter of course—the question of fraud or no fraud. In the application of the 59th section of this Act of Parliament, it must not be forgotten that substantive offences are not created by it; that a sentence of fine or imprisonment is not to be passed; that the debtor who is sent to prison under its provisions is still only to be "*detained* in execution;" that he cannot be detained a moment after the judgment is satisfied; and that the great principle of the Act is, that a person shall not be taken or charged in execution upon any judgment obtained in any court in any action for the recovery of any debt wherein the sum recovered does not exceed twenty pounds. This being so, it is not easy to conceive that any judge would entertain the question of making an order that a defendant may be taken and detained in execution before the time should have arrived for carrying the order, when made, into effect. It is submitted, then, that the judge who shall have made an order for the payment of money, will not enforce that order by issuing another that the defendant may be taken and detained in execution, until there shall be default or failure of payment, on service of the order, if there be not any direction therein for payment at a specific time or times,—or, at such times, if there be such a direction. All this applies with peculiar force to an assessor appointed under sect. 72, who, as we shall see, has not under this statute the power to make an order for payment, nor an order, absolutely, for taking a defendant in execution.

From what has been said, it follows that the judgment creditor is not in a situation to call upon the judge to make an order for taking the defendant, and detaining him in execution, until default and failure in payment of the amount recovered, according to the terms of the order for paying it.

It shall appear.

The defendant must be heard on the question of fraud or no fraud; he must not be taken and detained in execution upon a judgment in an action wherein the sum recovered does not exceed 20*l*., without having had an opportunity afforded him of showing that he is not a person against

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(*a*) A provision in the 26 Geo. 3, c. 38, s. 2, as to fraudulent concealment, is noticed below, p. 7.

whom the powers conferred by this section ought to be exercised. *The King* v. *Gaskin.* (*a*) *The King* v. *Davis.* (*b*) *The Queen* v. *Langley.* (*c*) *Begg's case.* (*d*) *Painter* v. *The Liverpool Oil Gas Light Company.* (*e*) *The Queen* v. *Smith.* (*f*) *R.* v. *The Guardians of the Totnes Union.* (*g*) It was intimated in the last paragraph that the question of fraud or no fraud, differs materially from that of debt or no debt: it would therefore be contrary to the very first principles of natural equity for the judge to determine the former, from his mere recollections or notes of what took place when the latter was litigated. The defendant must have notice of the application to the judge for an order that he may be taken and detained in execution, and of the time fixed for the hearing; the service of such notice must be proved; the plaintiff must be heard in support of his accusation of fraud: the defendant, if he attend, must be heard in his defence, if he choose to urge anything; and then, but not till then, will the judge be at liberty to make the order permitting the taking and detaining in execution. If service of the notice be proved, and the defendant do not attend, then, if the judge be of opinion that the plaintiff has established his case, the order may be made. The judge, however, will do well to let a reasonable time elapse between hearing and notice, and also to extend that time on sufficient cause shown. It cannot be too strenuously impressed on those who occupy the judicial seat of inferior tribunals, that there is not anything so alien and abhorrent from the spirit of the British law, as the condemnation of a man unheard, or not fully heard. Even the proceeding to make a trader a bankrupt is no longer *ex parte:* 5 & 6 Vict. c. 122, s. 23.

The wording of schedule B confirms these views:—

SCHEDULE (B).

Assessor's Fees.	s.	d.
For every summons - - - -	1	0
For every *hearing* or trial - - -	2	6
For every order, decree, or judgment -	1	0

The interpretation clause of the statute under consideration, sect. 73, directs that "the provisions of the said recited act, and of this act, shall be construed by analogy to the law of bankruptcy, except where otherwise herein respectively expressed, and in the most beneficial manner for

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(*a*) 8 T. R. 209.
(*b*) 9 D. & R. 234.
(*c*) E. 1842, not reported.
(*d*) 11 Rep. 99.
(*e*) 3 Ad. & E. 433.
(*f*) 13 L. J. qb. 166.
(*g*) 14 L. J. (n. s.) m.

promoting the ends intended by the said recited act, and this act." Now the Act referred to is the 5 & 6 Vict. c. 116, "An Act for the relief of Insolvent Debtors;" and the 12th section of it empowers a creditor, or official assignee, or other assignee, at any time after the final order shall have been made, to apply by motion to the commissioner that such final order be rescinded as far as relates to the protection of the petitioner's person from process; but it requires, that a month's notice be given to such petitioner. So, by the 22d rule of the Insolvent Debtors Court, notice must be given of a creditor's intention to oppose a prisoner's discharge.

Power to administer an oath to witnesses, and to examine the defendant on oath, to compel the attendance of witnesses, or disclosure of fraud by the plaintiff, has not been given by this statute to the "judge" of a court for the recovery of small debts, within the meaning and for the purposes of this section. This shows that the judge is not to entertain the question of fraud or no fraud *suo motu*. Unless then some general statute, or the Act under which a given court is constituted and governed, come in aid, that guaranty of his faithworthiness, which the oath of a witness furnishes, cannot be obtained. (*a*)

Several of the more recent statutes by which courts of requests have been constituted or rendered more efficient, are so worded, that the commissioners would have the power to administer an oath for the purpose of facilitating the inquiry before the assessor, and the violation of the duty imposed by such oath would be punishable as perjury. The General Court of Requests Act is the 26 Geo. 3, c. 38, "An Act for regulating the time of the imprisonment of debtors, imprisoned by process from courts instituted for the recovery of small debts; for establishing the claim of fees of gaoler and others in the care of such imprisonments; and for ascertaining the qualification of commissioners." The first section limits the time of imprisonment to twenty days, where the original debt does not exceed twenty shillings; and to forty days, where the original debt amounts to or exceeds forty shillings. The second section then proceeds thus:—"And, in order the more effectually to prevent persons summoned for debts to the said courts from the fraudulent concealment of their money or goods; be it enacted, by the authority aforesaid, that in case, upon the summons of any person for debt before the said court or commissioners, information of any such practice shall be given, such court or commissioners shall have power to hear evidence as to such fraudulent concealment; and in case it shall be proved

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(*a*) 2 Inst. 44; 2 Inst. 479, 719; Magna Charta, 9 H. 3, c. 28.

to their satisfaction, upon the oaths of two or more credible witnesses, (which oath the said court or commissioners are hereby empowered to administer, and which oath, if falsely taken, shall subject the party or parties so taking it to all the pains and penalties of wilful and corrupt perjury), that any such debtor has money or goods which he has wilfully and fraudulently concealed; in that case, the court or commissioners shall have power to enlarge the aforesaid times of imprisonment for debts under twenty shillings, to any time not exceeding thirty days; and for debts under forty shillings, to any time not exceeding sixty days; which said circumstance or ground of further detention shall be specified in the said commitment; and the depositions of the witnesses shall be entered in a book to be kept for that purpose by the clerk to each respective court or commissioners." If, then, at the trial of the cause, there be a suggestion of concealment, the powers conferred by the second section of the 26 Geo. 3, c. 33, may be put in force. But, it must be recollected, that "fraudulent concealment" are the words used, and that to cases of gift, delivery, transfer, or removal, the section does not apply. It would appear, further, that the legislature thought it necessary to confer express powers as well for entertaining the question of fraud, at the same time as the question of debt, as for administering an oath and punishing falsehood. The writer has not been able to discover any general Act that would give power to the judge to administer an oath, under this section, so as to involve in the guilt of legal perjury the person who should take it and depose to a falsehood. The 13th section of the 5 & 6 W. 4, c. 62, enacts "that it shall not be lawful for any justice of the peace or other person to administer, or cause or allow to be administered, or cause or allow to be received, any oath, affidavit, or solemn affirmation touching any matter or thing, whereof such justice or other person hath not jurisdiction or cognizance by some statute in force at the time being." This enactment would not, it is believed, authorize the infliction of penalties on a judge were he to administer such an oath for the purpose of enabling himself to decide whether he should exercise the power conferred on him by the section under consideration. But still the power to compel a witness to be sworn, and to punish him for perjury, would be wanting.

To the Judge who shall try such cause, being either a Judge of the Superior Courts, or a Barrister, or Attorney-at-Law.

The plaintiff, in a cause determined in a court of requests, will be unable to procure the exercise of the powers conferred by the 59th section, unless the cause in which

the judgment shall be recovered, shall have been tried by a "judge" of the court, and that judge has been either a barrister or attorney-at-law.

The 72nd section of the Act makes provision for the appointment of such a judge to those courts for the recovery of small debts that are constituted or regulated by acts of parliament which do not contain such a provision. It is in the words that follow:—

"And whereas there are divers courts of requests and other inferior courts for the recovery of small debts not presided over by a barrister or an attorney-at-law as judge or assessor; (*a*) be it enacted, that it shall be lawful for the commissioners of any such court, if they shall think fit, with the approval of one of Her Majesty's principal secretaries of state, to appoint any person, being a barrister who shall have practised as a barrister for at least seven years then last past, or an attorney-at-law of one of the superior courts of common law at *Westminster*, or of the court of Common Pleas at *Lancaster*, who shall have practised as an attorney for at least ten years, to be the assessor of such court, and to direct what fees shall be paid to such assessor by the suitors of such court, not exceeding the fees in the schedule marked (B) hereunto annexed; and it shall be lawful for the said secretary of state to remove any such assessor for incompetence or misbehaviour: provided always, that no assessor so to be appointed shall be deemed to be entitled to any compensation for the loss of his office, or for any diminution in the value thereof, by reason of the passing of any general Act for the recovery of small debts."

The words are, "It shall be lawful for the commissioners of any such court, if they shall think fit," &c. It is not imperative, therefore, on the commissioners to appoint an assessor. But the first section of the 8 & 9 Vict. c. 127, confers such great advantages on the suitors of courts, which have by their constitution a judge, who is a barrister, a special pleader, or an attorney who has practised as an attorney for not less than ten years, that it would be scarcely decent to suppose that the commissioners of courts of requests will abstain from appointing an assessor, even though their jurisdiction should not be enlarged under the 8 & 9 Vict. c. 127, s. 9.

(*a*) The 26 Geo. 3, c. 38, s. 8, prescribes the qualifications of the persons who shall be capable of acting as "a commissioner in the execution of any acts for constituting such courts," and inflicts a penalty upon the person, not being so qualified, to be recovered in the manner therein directed "upon proof being given of his having acted as a *commissioner* in the execution of any of the acts." It is conceived, however, that the "assessor" is not within this; and that proof of a person having acted as "assessor," will not be equivalent to proof of his having acted as a "commissioner."

Who shall *try the cause.*

The judge is to exercise the power conferred on him by the 59th section only in causes which he "shall" try. The barrister or attorney, therefore, who may have been appointed "judge," "steward," or "assessor," before this Act came into operation, can only exercise these powers in the case of causes which he has tried since the Act came into operation (9th August, 1844). The "assessor or judge" to be appointed under the Act, cannot of course bring himself within the meaning of the words "shall try" in respect of causes determined before his appointment.

Who shall try *the cause.*

These words, coupled with the 72nd section, will be held, it is conceived, to give the judge the power, and to impose on him the duty, of trying each cause. But the power of the commissioners to try remains untouched; and if they be not satisfied with the evidence elicited by the assessor, it will be their duty to try the case for themselves. Let the arrangement, however, be what it may, to give himself jurisdiction, the judge must "try" the cause. By this it is not meant that he must necessarily hear a half-a-dozen witnesses, on one side and on the other, but that he must hear all the evidence legally tendered by each party. The judgment pronounced by *Coleridge*, J., in the very important case of *The Queen* v. *the Inhabitants of Evenwood and Barony* (*a*) appears aptly to adumbrate the duty of a judge of a court of requests in applying this section. It is in these words (*b*):—"The decision on the first appeal appears to me to have been on the merits, by which I understand a decision on the issue after all the legal evidence tendered on either side has been heard. If there be exclusion, wholly or partially, of such evidence, then the decision cannot be said to have been made on the merits; but where all the evidence legally tendered has been heard, the party who has brought forward insufficient evidence must not come here to complain that the merits have not been gone into. If he was improperly prepared, it was his own fault. Were we to depart from this rule, we should not know where to stop." In every instance, therefore, unless the defendant distinctly and expressly admits before the judge the justice of the demand, the plaintiff should be put to the proof of his case.

(*a*) 13 L. J. *m.* 19; 7 Justice of the Peace, 626.

(*b*) 7 J. P. 628.

That the defendant in incurring the debt or liability.

The words of the 57th section are—"in any action for the recovery of any *debt* wherein the sum recovered," &c. If then a precise and strict construction be the one proper to be adopted, the use of the word "liability" in the 59th section will not enlarge the meaning of the word "debt," in the 57th section. It is conceived, however, that the legislature could not have intended that the beneficial operation of the Act should be strictly confined to actions of debt. *Assumpsit* is the only remedy for the recovery of an instalment due on a simple contract in respect of an entire sum payable by instalments the whole of which have not accrued due. (*a*) So also when a simple contract creates a collateral liability, as for the payment of the debt of a third person, debt not being sustainable, *assumpsit* is the only form of action. (*b*) It is conceived then, that the word "debt" in the 57th section, may be taken to mean "debt or liability;" that is, liability in the nature of a debt. The several statutes that relate to bankruptcy treat a subject-matter correlative to that of the statute under consideration; it will not be improper, therefore, to resort to the meaning which has been put on the word "debt" by those whose duty it has been judicially to construe those statutes. Now, with regard to the proof of debts under a fiat of bankruptcy, the rule is this: the debt must be "of an amount either actually ascertained, or which may be readily ascertained by computation, without the intervention of a jury; (*c*) as for goods sold, for work and labour done (whether for a price agreed upon or not) (*d*), for money lent, money laid out and expended, money had and received, (*e*) or on a bill of exchange or promissory note, or for taxes or rates due by the bankrupt, (*f*) or received by the bankrupt as collector, &c. (*g*) or the like, and not simply a claim sounding merely in damages, and those damages unliquidated (*h*); as for breach of an agreement to accept or deliver goods (though at a price certain and on a day certain) unless it is a contract to deliver stock on a day certain, (*i*) or for mesne profits, (*j*) or for a tort, or in

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(*a*) *Rudder* v. *Price*, 1 Hen. Black. 547; *Beckwith* v. *Nott*, Cro. Jac. 504, 2 Saund. 303, *n.* 6, 337, 350, 374; Fitzg. 302, Com. Dig. Action, (F.)

(*b*) *Hardr.* 486, Com. Dig. Debt (B.)

(*c*) 1 Flather, 119 (10th ed.)

(*d*) *Johnson* v. *Spiller*, Dougl. 167.

(*e*) *Wright* v. *Hunter*, 1 East. 20.

(*f*) *Lloyd* v. *Heathcote*, 2 B. & B. 388.

(*g*) *R.* v. *Tacker*, 5 M. & S. 508; *Ex p. Exleigh*, 6 Ves. 811: *Ex p. Child*, 1 Atk. 11.

(*h*) *Ex p. Mumford*, 15 Ves. 289; *Ex p. Mare*, 8 Ves. 335.

(*i*) *Green* v. *Bicknell*, 8 Ad. & E. 701.

(*j*) *Goodtitle* v. *North*, 2 Doug. 583.

trover, (*a*) or for breach of covenant, unless it be a covenant for the payment of money, (*b*) or the like, even although such covenant, &c. be secured by a penalty." (*c*) If the word "debt," in the 57th section, be interpreted according to the rule thus laid down, the intention of the legislature will, it is believed, be fully carried out. It is only to persons within the beneficial provisions of the 57th section that the 59th section applies; to determine, therefore, what the sense of the word "debt" is in the former of these two sections, is also to fix the meaning of the phrase "debt or liability," in the latter.

Which may be the subject of demand.

The charges which the statute 1 & 2 Vict. c. 110 empowers creditors to urge against the immediate liberation of an insolvent debtor, are divisible into two classes; 1st, Those which affect the interests of the general body of the creditors, (s. 77); and 2nd, Those which relate to injuries done to particular creditors, in their individual capacity (s. 78). Under this second head are classed, along with others on which it is not necessary to animadvert, certain transactions which fall within the scope of the section now under consideration; these are, contracting the debt of the opposing creditor fraudulently, or by false pretences, or without having had any reasonable or probable expectation, at the time when the debt was contracted, of ability to pay the same. Now it has always been held by the commissioners of the Insolvent Court, with regard to false pretences, or fraud, that the debt of the opposing creditor must have been actually contracted by means of the alleged fraud, or false pretence; and with regard to contracting debts without a reasonable expectation of ability to pay, that the complaint must be limited to the particular debt of the individual creditor who opposes, in order to justify remand under the 78th section. (*d*) This enables us to fix the meaning of the words, "which may be the subject of demand." If it be shown that there has been fraud or false pretence in the manner of obtaining credit in the particular transaction which is the subject-matter of the cause, or that at the time when the debt or liability was incurred the defendant had not a reasonable assurance of being able to pay the particular debt, then he is not entitled to the

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(*a*) *Parker* v. *Norton*, 9 T. R. 695; *Longford* v. *Ellis*, 1 H. Bl. 29.

(*b*) *Goodtitle* v. *North*, 2 Dougl. 583. *Bannister* v. *Scott*, 6 T. R. 489. *Charlton* v. *King*, 4 T. R. 136. *Hammond* v. *Toulmin*, 7 T. R. 612.

(*c*) *Ex p. Maclean*, 2 M. D. & D. 564.

(*d*) Cooke's Insolvent Debtors' Practice, 209, 212, 2nd ed.

benefit of section 57, and the judge may apply the powers conferred on him by section 59. But the inquiry must be directed—the proof confined—to the particular debt that forms the basis of the judgment on which it is sought to take the defendant and detain him in execution. How far fraud or wantonness in other transactions with the same plaintiff, or with other persons, may be used as evidence of fraud or wantonness in the particular transaction, must depend on the circumstances of each case.

Has obtained credit from the plaintiff.

The section presupposes two modes by which credit may be given; the one by which the debtor uses some active means of inducing the creditor to trust him; the other, in which the debtor does not resort to any special inducement. In the first case, the debtor may be said to have "obtained" credit. The phrase "from the plaintiff," has a similar restrictive effect to that of the words, "the subject of demand."

Under false pretences.

When a debt has been contracted by means of the assertion of a falsehood, it is said to have been contracted by false pretences. (*a*) To support an application that a defendant may be taken and detained in execution under the 59th section, on the ground that in incurring the debt he had obtained credit under false pretences, the plaintiff must show the inducement to the debt, and that without such false representations or pretences he would not have allowed the debt to have been contracted with him. It has been the practice to the Insolvent Court to examine the insolvent himself, after proof of the inducement, to show that the pretences or representations were false in fact; but the statute under consideration does not confer the power necessary for compelling the defendant to appear and answer, or for punishing him should he answer falsely. In this instance, also, the powers conferred on the commissioners by certain local Acts may be rendered available, if they shall think fit, for a more efficient and stringent exercise of the powers which the section under consideration vests in the assessor. From the words at the commencement of the section, "it shall appear to the judge," it would seem that the plaintiff must make out a *primâ facie* case, and that so far the *onus probandi* will be on him. The general rule with regard to proving the issue is, that the party who asserts the affirmative is bound to prove it.

(*a*) Cooke's Insolvent Debtors' Practice, 200, 2nd ed.

True it is, that when the affirmative is peculiarly within the knowledge of the party charged, the presumption of law in favor of innocence has not been allowed so to operate as to impose on the person who makes a charge the necessity of proving a negative; and in that case the general rule would be this—that he who asserts the affirmative is to prove it, and not he who avers the negative. (*a*) Thus, in an action on the game laws, though the plaintiff must aver that the defendant was not duly qualified, yet he cannot be called upon to prove the want of qualification. (*b*) In an action against a person for practising as an apothecary without having obtained a certificate according to 55 Geo. 4, c. 194, the proof of the certificate lies upon the defendant, and the plaintiff need not offer evidence of his practising without it. (*c*) So, on an information for selling ale without a licence, the only evidence given was that the party had sold ale, and proof was not offered that he had sold it without a licence; the party having been convicted, it was held that the conviction was right; for that the informer was not bound to sustain in evidence the negative averment; and it was said by *Abbott*, C. J., that the party thus called upon to answer for such offence sustains no inconvenience from the general rule, for he can immediately produce his licence; whereas, if the case be taken the other way, the informer is put to considerable inconvenience. (*d*) But where ejectment is brought for breach of a covenant to insure "in some office in or near London," it lies on the plaintiff to give at least some slight proof of the omission, (*e*) and it was said in the case of *Doe* v. *Whitehead*, (*f*) that in the instance above cited, of convictions, &c., the burden of proof lay on the defendant, not because the matter was peculiarly within his knowledge, for that did not vary the rule of law, but because the legislature had in these cases, by a general prohibition, made the act of the defendant *primâ facie* unlawful. Further, in criminal cases, in indictments for false pretences, the burden of the proof lies upon the prosecutor. (*g*) It would seem, then, that the plaintiff must distinctly make out his case, before the defendant can be called on for an answer.

In reference to false pretences generally, the following observations must be made. It is not necessary that the pretence have been in words; the conduct and acts of the party will be sufficient, without any verbal representation:

(*a*) 2 *Russell on Crimes*, 692, 2nd ed.

(*b*) *Spieres* v. *Parker*, 1 T. R. 144; *R.* v. *Turner*, 5 M. & S. 206.

(*c*) *Apothecaries' Company* v. *Bentley*, R. & M. 159.

(*d*) *R.* v. *Harrison*, Paley on Convictions, 45 (2) 2nd ed.

(*e*) *Doe* v. *Whitehead*, 8 A. & E. 571.

(*f*) 8 A. & E. 571.

(*g*) Archbold's Pleading and Evidence in Criminal Cases, 249, 4th ed.

thus, where a party, not being a member of the University of Oxford, went into a shop there, wearing the academic cap and gown, and obtained goods, his dress was held a sufficient false pretence, though nothing passed in words. (*a*) The pretence must be of some existing fact: therefore, a pretence that the party would do an act that he did not mean to do, as a pretence to pay for goods on delivery, is not a false pretence, but merely a promise for future conduct. (*b*)

Or with a fraudulent intent.

"Intent" cannot be made out by direct evidence; it may be confessed; it may also be gathered from the conduct of the party as shown in proof; and when the tendency of his actions is direct and manifest, he must always be presumed to have designed the result when he acted. (*c*) This being so, it is only necessary under this head to treat of fraud. Now the fraud necessary to maintain a general plea of fraud and covin, must be some concealment or deception practised by the plaintiff with respect to the very transaction in question. (*d*) It may be passive, as by permitting another party to labour under error, (*e*) or to act on a false representation by a stranger. (*f*) For the object of the present inquiry, the word fraud may be said to signify "any deceitful or dishonest scheme, plan, or contrivance, whereby one person is induced to lend to, or pay for another, money; or to sell goods, or to part from any species of property, by which a debt is actually incurred." (*g*) Fraud then may be committed as well by the suppression of truth, as by the positive assertion of falsehood; by the concealment of circumstances, which, if known to the creditor, would have had the effect of preventing him from giving the credit, as well as by a statement of matter false in fact.

The observations that have already been made on the *onus probandi*, apply to questions of fraudulent intent, and need not be repeated.

Or has wilfully contracted such debt or liability.

"Such debt;" that is, the debt which may be "the subject of demand." The words of the 78th section of the 1 & 2 Vict. c. 110, are, "shall have contracted." It would be somewhat difficult to point out a distinction between *con-*

(*a*) *R.* v. *Barnard*, 7 C. & P. 784.
(*b*) *R.* v. *Goodhall*, R. & R. 461.
(*c*) *R.* v. *Harrington*, R. & R. 207.
(*d*) *Green* v. *Gordon*, 3 M. & G. 434.
(*e*) *Hill* v. *Gray*, 1 Stark. 434.
(*f*) *Pilmore* v. *Hood*, 5 New Ca. 97.
(*g*) Cooke's Insolvent Debtors' Practice. 109, 2nd ed.

tracting a debt—if to the word debt there be assigned its strict meaning—and *wilfully contracting a debt*. The word "liability," however, comes in aid, and lets in those causes of action which spring from implied duties or promises. Now, if a meaning can be assigned to a word in an act of parliament, and that meaning be not only not repugnant from the context and the general spirit of the Act, but easily reconcileable with both, it should be adopted. Obviously there are certain cases in which a debt may be involuntarily contracted; if, in any such case, the debtor at the time when he contracted the debt had not reasonable assurance of ability to pay, he would, it is submitted, be entitled to the benefit of that interpretation of the word which is now suggested. In such cases the word would be construed "designedly," "premeditatedly."

In a case in the Common Pleas, a writ of false judgment was held not to lie from the Southwark court of Requests, on the ground that the statute directed the judgment of the court below to be given "according to equity and good conscience." (*a*) It will not be easy for those who administer the law under such a direction, to put on the word "wilfully" in this section a construction that shall have the effect of enabling those who get their living by the machinations of the "tally system," to imprison their debtors.

Without having at the same time a reasonable assurance of being able to pay or discharge the same.

When an application, founded on these words of this statute, shall be made, considerable difficulty will arise from the want of a power to compel the defendant to undergo an examination and to punish him if he answer falsely; unless, indeed, the local Act, in consequence of the mutual good understanding between the commissioners and the assessor, shall come in aid. Still, it is conceived, that if the principles which the Insolvent Court has applied, be followed out, there will not be a failure of justice. In the Act 1 Geo. 4, c. 119, s. 18, the words "reasonable or probable *expectation*" were substituted for "probable *means*," which were used in the earlier statutes: for it seems to have been thought that allowance should be made for the fair prospect of professional exertions or commercial enterprise, for the reasonable hopes of assistance from friends, or for many other contingencies of life. This phraseology was preserved in the 1 & 2 Vict. c. 110, s. 78. In the statute 5 & 6 Vict. c. 116, the words "reasonable assurance" were employed for the first time. They are

(*a*) *Scott* v. *Bye*, 2 Bin. 344.

undoubtedly very strong; for they seem to exclude all mere expectations, however reasonable or probable, and indeed all excuses not based on circumstances which it was not impossible to foresee. Though, then, the creditor has not the power to examine the debtor unless he choose to submit to an examination, except under the local Act, and the conditions aforesaid; and though, in this instance, as indeed generally, under this section, the burden of the proof will rest on the plaintiff; yet the defendant, whether or not he may be examined, will derive far fewer advantages from his own statement than, under the older statutes, he could have obtained therefrom.

Following then the practice of the Insolvent Court, as far as is feasible, it may be said that the subjects for the consideration of the court are, the situation in life of the defendant, and the nature of the debt due to the plaintiff; whether it was contracted for purposes of luxury or for necessaries: and, if the defendant be a trader, whether it was contracted for goods in his trade. In commenting on the analogous provisions of the stat. 1 & 2 Vict. c. 110, Mr. Cooke says: (*a*) "A debt contracted by a trader, for goods in the ordinary course of his business, has never been held to come within this provision of the statute: for if the articles purchased were obtained at a fair price, the trader must be presumed to have in his possession of them, not only a reasonable and suitable *expectation* of paying for them, but also of gaining a profit by the sale. Circumstances may, indeed, be connected with the mode of purchase and of subsequent disposition of these goods, which may give evidence of a fraudulent intent on the part of the insolvent; but the transaction would then range itself under another class of offences to which we have already alluded, and which would call for a very different species of judgment." These observations, it is apprehended, apply to the administration of the statute under consideration. Purchases on credit, based on the experience which a man has had of the course and returns of his business, and not in a spirit of wild and adventurous speculation, cannot be said to have been made without a reasonable assurance of ability to pay the debts thereby created. The mode of purchase, and the subsequent disposition of such goods, may undoubtedly furnish strong evidence against the debtor, either of original fraud against an individual creditor, or of subsequent misappropriation in fraud of his creditors generally, or of some one of them.

In reference to the classes of debts that have just been considered, those namely that have been contracted "under

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(*a*) Insolvent Debtors' Practice, 213, 2nd ed.

false pretences," "with a fraudulent intent," or at a time when the debtor had not "a reasonable assurance of being able to pay the same," it is necessary to be observed generally, that the conduct of the creditor may be such as to operate a waiver of the original taint that attached to the transaction. Any agreement or settlement, between the parties subsequent to the contracting of the original debt, which has the effect of altering the nature or character of the creditor's claim, will debar the creditor from urging against an insolvent any charge of fraud on account of the particular debt, provided that there be no fraud to vitiate such subsequent agreement. So, a complaint of fraud or other misconduct against an insolvent, shall be said to be *waived* by the creditor, if at any time subsequent to the contracting of the original debt, he shall agree to accept the bills or other securities of other persons, by means of which he is placed in a better situation with respect to his chance of payment than that in which he previously stood; so also, if, having discovered the alleged fraud or misconduct, he shall still continue to deal with him on credit, or repose other confidence in him. In other and similar cases the court has presumed that the creditor had pardoned the original offence, and would not allow him, on account of any subsequent disappointment, to revert to the original transaction, for the purpose of thereby prolonging the imprisonment of the debtor. Further, according to the practice of the Insolvent Court, although an insolvent may have contracted a debt by fraud, or false pretences, or by breach of trust, or in any other manner, which, if brought before the court in its original circumstances, might have subjected him to an adverse judgment, yet, if he shall become bankrupt, or compound with his creditors, and after certificate obtained, or composition made, he shall renew this debt, the creditor shall not be allowed to revert to the original fraud, as a ground of opposition. (*a*)

Or shall have made any gift, delivery, or transfer of any personal property, or shall have removed or concealed the same, with an intent to defraud his creditors, or any of them.

We have now to discuss those grounds of an application for the committal to prison of a debtor within the 57th section of the statute, which are founded on conduct that affects the interests of the general body of his creditors. Any creditor may under this statute urge such conduct in support of such an application, although direct injury

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(*a*) Cooke's Insolvent Debtors' Practice, 210—204, 2nd ed.

to himself may not have been thereby contemplated. "Intent," as before has been observed, must be gathered from overt acts; and it is a presumption of law, that every man knows the direct consequences and tendency of his own acts. It remains then to determine the meaning of the several phrases, "defraud his creditors," "transfer," "gift," "delivery," "removal," and concealment of "personal property."

First, then, with respect to the phrase "defraud his creditors." Now the meaning put on the analogous words in the bankrupt act has been, "contrary to the policy of the bankrupt laws, which are intended to secure to the general creditors an equal division of the bankrupt's estate." (*a*) So, in the administration of the insolvent acts, the notion attached to the word "fraud" in respect of the prejudice thereby accruing to the creditors generally, has been this—something having a direct tendency to diminish the sum divisible among the creditors. (*b*) Now the Act under consideration relates to "insolvency, bankruptcy, and execution;" and the 73d section directs that the provisions of the Act shall be construed by analogy to the law of bankruptcy. Further, the sections that relate to execution, (sections 57 to 69 inclusive,) while they restrict the remedies of the judgment creditor against the person of his debtor, enlarge the remedies against his property. The object, then, of this part of the Act may without impropriety be stated to be, to render the property of debtors more easily available for the satisfaction of judgment creditors. If this be so, the test of fraud in respect of these sections, is the tendency of the conduct of the debtor, in giving, delivering, transferring, removing, or concealing his personal property, to prevent his creditors, or any of them, from satisfying out of it—or of the proceeds of it—the judgments which they may have recovered against him.

Gift, delivery, or transfer of any personal property.

In the first place, it is to be observed, that the right of the person to whom the gift, delivery, or transfer of a chattel has been made, to retain the chattel, is not the test of the fraudulent character of the transaction, for the purpose of determining whether or not a debtor shall be deprived of his liberty. So that the decisions pronounced by the courts of Westminster Hall, in cases of undue preference arising out of bankruptcies, and therefore relating solely to civil rights, as between assignees and others, do not afford satisfactory rules for the guidance of the judge who shall have

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(*a*) *Balme* v. *Hutton*, 2 Y. & J. 101.

(*b*) Cooke's Insolvent Debtors' Practice, 186, *seq.*, 2nd ed.

to administer the provision now under consideration; and, indeed, a fraudulent intention, in the ordinary sense of the word, is not essential to a fraudulent preference. (*a*) The decisions, just mentioned, will however be of material assistance in assigning a meaning to words, and in determining the weight of evidence.

The meaning of the word "gift" is obvious; it describes the act of parting with that which is valuable, without receiving, or bargaining, expressly, or by implication, to receive, anything in return. In the case of *Cook* v. *Caldecott*, (*b*) *Lord Tenterden*, C. J., said, "the words of the clause are 'fraudulent gift, delivery, or transfer,' the word 'fraudulent,' of course, applying to each of those which follow it. Now a 'sale' is a 'transfer,' and therefore may come within the provision of the statute as a 'fraudulent' transfer. But though it may do so, it is not from its nature a transaction exposed to the same suspicion as some of those which would be comprehended under the former words;" that is, under "gift" or "delivery." In the case of *Cobden* v. *James*, (*c*) the same learned judge said:—"The word 'delivery' is one of very general signification; but standing as it does in stat. 6 Geo. 2, c. 16, s. 3, connected with the words 'gift or transfer,' I incline to think it must be confined in interpretation to transactions of the same nature." If, then, the word "transfer" be deemed antithetical to "gift," it would be applicable to a parting from property on receiving something in return for it, or, at least bargaining, expressly or by implication, to receive something in return for it. The word "delivery," according to the case of *Cobden* v. *James*, would be applicable to a mixed transaction, partly a gift and partly a transfer, or ostensibly either, without any intention to part with more than the bare possession of the thing.

Personal property.

This, for the purposes of the section under consideration, can only mean such property as can be taken in execution by a judgment creditor. The jurisdiction of Courts of Requests, when to such property there is a claim opposed to the ostensible right of the debtor, will be considered hereafter with the provisions of section 68. The old law protected from execution "money, bank notes, cheques, bills of exchange, promissory notes, bonds, specialties, or other securities for money." By section 12 of the stat. 1 & 2 Vict.

(*a*) *Poland* v. *Glynn*, 2 D. & R. 310; *Herman* v. *Fisher*, Cowp. 117.

(*b*) M. & M. 522.

(*c*) M. & M. 273.

c. 110, this was altered, and all such property may now be taken by "virtue of any writ of *fieri facias* to be sued out of any superior or inferior court after the time appointed for the commencement of this act, or any precept in pursuance thereof," by "the sheriff or other officer having the execution thereof." The money and the bank notes may be applied at once towards the payment of the amount endorsed upon the writ. If there be not sufficient to satisfy the levy, the sheriff shall hold the cheques, bills, promissory notes, and other securities, as security for the amount indorsed on the writ, and may receive from the debtors on such securities the amount due on them respectively; but he shall not be bound to sue any of such persons, unless the execution creditor shall indemnify him against all acts and expenses by entering into a bond, with two sufficient sureties, to that effect. The money arising from these securities, shall be liable, in the first instance, to satisfy all the costs and charges of the sheriff or other officer executing the writ; the execution creditor shall then be entitled to the amount directed to be levied, with interest, at the rate of four per cent. from the date of the judgment; and the surplus, if any, shall be paid over to the party against whom the writ was issued. If, then, the definition of personal property, for which the writer has just contended, be correct, the gift, delivery, transfer, concealment, or removal of money, will subject a debtor to the exercise of the coercive powers conferred by section 59 of the statute under consideration.

Next, as to evidence. This must relate to the debtor's acts or admissions. If a man admit that he did the particular act with the intent of defeating or delaying his creditors in the recovery of their judgment debts, the admission is almost conclusive evidence of the fact, and can scarcely be explained away; (*a*) and anything said or written by the defendant before an act, in itself equivocal, was done, tending to explain it, is admissible; (*b*) so, likewise are acts or declarations of the debtor at the time of the transfer, and suspicious circumstances attending the transfer itself, as—that it was made on the proposal of the debtor; (*c*) at an unreasonable hour; (*d*) that it was executed in secret; (*e*) that a possible memorandum of the transaction is falsely dated; (*f*) that the terms of a possible

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(*a*) *Rawson* v. *Hay*, 2 Bin. 99.

(*b*) *Smith* v. *Cramer*, 1 Scott. 541; *Satt* v. *Thomas*, 6 C. & P. 611.

(*c*) *Crosby* v. *Crouch*, 11 East, 256; *Smith* v. *Payne*, 6 T. R. 152; *Singleton* v. *Butler*, 2 B. & P. 283.

(*d*) *Compton* v. *Bedford*, 1 W. Black, 363; *Harman* v. *Fisher*, Cowp. 117; *Hartshorn* v. *Slodden*, 2 B. & P. 582.

(*e*) *Wilson* v. *Day*, 2 Burr. 827; *Jacob* v. *Shephard*, cit. 1 ibid. 478; *Twine's case*, 3 Co. 81.

(*f*) *Singleton* v. *Butler*, 2 B. & P. 283.

agreement relating thereto are general, when in an ordinary case they usually are specific; (*a*) that it was made to secure a sum not due; (*b*) or a larger sum than was due. (*c*)

Fraudulent or undue preference is not within the meaning of this section, or even of the 24th section of this act; it is also omitted from the 5 & 6 Vict. c. 116. The object of sections 57 to 68 being, not to effect the surrender of property for equal distribution, but to provide that, if the defendant have property, it shall be forthcoming when an execution issues, it would be hard indeed to punish the debtor for anticipating, as to any given debt, the effect of an execution.

It remains to add, that the proof of the facts, if they be recent, will in cases of concealment or removal go far towards so substantiating the case as to justify the judge in inferring fraud, if the presumption arising therefrom be not rebutted.

It will of course be competent to the creditor who discovers that under the pretence of paying or giving security for the payment of a debt actually due, fraud has been committed, to bring the circumstances before the notice of the judge, and to insist on their criminality. In the case of deposits, excessive value will be the test of fraud.

Or shall have removed or concealed the same.

Removal and concealment are distinguished from gift, delivery or transfer; in the latter the ownership passes, really or ostensibly, from the debtor to some one else; on the other hand, in cases of removal or concealment, the attempt at fraud is made without any change of ownership, real or ostensible. When the personal property, in the ownership of the debtor, remains on the premises occupied by him on which execution is to be levied, but by some artifice is rescued from seizure, it will be said to have been "concealed;" if it be taken off those premises with a like object, it will be held to have been "removed" within the meaning of this section. Upon the evidence it is not necessary to make any remark. By the 7 & 8 Geo. 4, c. 29, s. 24, a person cannot be convicted of the offences of stealing or destroying or concealing a will, or of stealing writings relating to real estates, if at any time previously to his being indicted for the offence, he shall "have disclosed such act on oath, in consequence of any compulsory process of any court of law or equity, in any action, suit or proceedings

(*a*) *Twine's case*, 3 Co. Bl.; *Wilson* v. *Day*, 2 Burr. 827; *Alderson* v. *Temple*, 4 ibid. 2235.

(*b*) *Singleton* v. *Butler*, 2 B. & P. 283; *Pulling* v. *Tucker*, 4 B. & A. 382.

(*c*) *Wilson* v. *Day*, 4 Burr. 827.

which shall have been *bonâ fide* instituted by any party aggrieved; or if he shall have disclosed the same in any examination or deposition before commissioners of bankrupt." Thus, depositions on oath under compulsory process of law, and disclosures on a bankruptcy, are put on an equal footing. Now, if such disclosures be made to a court of bankruptcy, or the court for relief of insolvent debtors, the court would visit with punishment the bankrupt or other dishonest debtor, or, withholding protection altogether, would remit the debtor to the consequences of legal process. It does not appear then that the judge should allow himself to be deterred from exercising the powers conferred by this section, because the proof of the facts that justifies the exercise of them has been obtained in the manner indicated by the section of the 7 & 8 Geo. 4, c. 29, just cited.

It shall be lawful for such judge.

"It shall be lawful," are words directory only. "Such judge," refers to the judge named in the preceding part of the section, who shall try such cause, being either a judge of one of the superior courts, or a barrister or attorney-at-law—being, for the present purpose, the assessor appointed under this act.

If he shall think fit.

Thus, even after proof of fraud or extravagance, it will be discretionary with the judge whether or not he will order that the debtor may be committed to prison. Upon the exercise of the discretion, it is somewhat difficult to give sound advice. It may not, however, be improper to remark, that an order for taking a debtor and detaining him in execution for a debt of a sum under 20*l.* will, for the future, amount to a judicial affirmation of the fact, that the debt was contracted either by absolute fraud, or with a recklessness as culpable as dishonesty, if in itself to be distinguished from it.

To order.

Some doubts have arisen as to the precise form of the order, and it has been asked whether it must be made by "indorsement on the record, or by a special certificate that the case is a fit one for such an order." (*a*) They will be of some importance in cases tried by the superior courts, or

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(*a*) The Law and Practice of Insolvents in the Bankruptcy Court, &c. by *S. C. Horry, Esq.*

on a writ of trial. In cases determined by courts of requests, however, as the order will, in the first instance, be permissive of ordinary execution, it is apprehended that it must be special, no matter whether there have been an entry of judgment, or a substantive order for payment. There must be due observance of the inflexible rule in the construction of convictions, or orders, or commitments, that they who make them must show that they have jurisdiction. The effect of the 57th section will be to deprive the court of jurisdiction, unless it have been acquired under the 59th section. Now, in the case of *The King* v. *Tomkins*, 8 *East*, 180, it was held, that it was not enough in an order for remanding an insolvent debtor by the sessions, to state that it appeared that he had obtained goods of A. B. (at whose suit he was detained) by false pretences: for either it should be stated in the words of the stat. 41 Geo. 3, c. 70, s. 40, (by virtue of which the order was made,) that the party knowingly and designedly, by false pretences, obtained the goods; or at least, that he fraudulently, by false pretences, obtained them—the description of the offence adopted by the stat. 46 Geo. 3, c. 108, s. 39, with reference to the former statute (which word "fraudulently" is also used in the recital of the section in the former act)—and a second order of remand, however regular under the last statute, professing to be made upon view of the former defective order, was therefore quashed. It will therefore be necessary that the order contain, find, and adjudicate on a statutory description of the grounds on which the judge thinks fit to order that the debtor may be taken and detained in execution. The several grounds enumerated in the statute are these:—

1st. Incurring the debt or liability which may be the subject of the demand (in the cause) by false pretences.

2nd. Incurring the debt or liability which may be the subject of the demand (in the cause) with fraudulent intent.

3rd. Obtaining credit from the plaintiff (for the subject of the demand) under false pretences.

4th. Obtaining credit from the plaintiff (for the subject of the demand) with a fraudulent intent.

5th. Wilfully contracting the debt or liability (the subject of the demand) without having had at the time when it was contracted a reasonable assurance of being able to pay or discharge the debt or liability.

6th. Causing any gift of personal property to be made with intent to defraud the creditors of the defendant or any of them.

7th. Causing any delivery of personal property to be made, with intent to defraud the creditors of the defendant, or any of them.

8th. Causing any transfer of personal property to be made, with intent to defraud the creditors of the defendant, or any of them.

9th. Removing personal property, with an intent to defraud the creditors of the defendant, or any of them.

10th. Concealing any personal property, with an intent to defraud the creditors of the defendant, or any of them.

It will be desirable to follow the words of the statute as closely as possible.

Next:—The order must appear to have been made by a person having authority to make it,—that is, by a person being

1st. "A barrister or attorney-at-law;" and,

2nd. "The judge" (that is, the person appointed as assessor under the 72nd section; or the clerk, judge, steward, assessor, or person holding or presiding in the court, being a barrister or attorney-at-law).

3rd. "Who tried the cause." The person with whom the debt was contracted, or from whom credit was obtained, must be the plaintiff in the cause.

Lastly:—The order must show that it was made to "appear" to the judge, &c; and it will be safe to recite the fact that there has been notice to the defendant, a hearing of the plaintiff's case, on the issue of fraud or no fraud; and, as the fact may be, a hearing of the defendant, or his non-attendance after notice.

That such defendant may be taken and detained in execution upon such judgment.

The order of the judge is to be, that the defendant "may," not that he "shall," be taken in execution: so that it in fact, in the first instance, only removes the prohibition virtually imposed by the 57th section.

The judgment must be in the particular cause which the order will recite that the judge has tried; and in the case of an assessor appointed under section 72, will be the judgment of "the court," not of "the judge." "The court" must make the order that the defendant be taken in execution; as the order of the assessor, under section 72, will, in the first instance, only be a permission to take in execution despite section 57. The debtor once taken and detained under the order, will be in "execution;" his position, therefore, will be subject to the incidents of execution. He will be entitled to his discharge on satisfying the judgment; the judgment creditor also may discharge him; he may also petition to be protected from process, and from being detained in prison in execution, under section 6 of the statute under consideration. It is very much to

be doubted, however, whether a commissioner would feel justified, under such circumstances, in ordering the debtor to be discharged.

The words "upon such judgment," offer additional proof that the legislature did not intend the judge to exercise the powers conferred on him by this section *suo motu*. The order could not be operative without the consent of the creditor, and the legislature cannot have intended that an order made by a judge *suo motu*, should be dependent for its operation on the consent of a suitor to his court.

In like manner and for such time as he might have been if this Act had not been passed.

The manner of the taking and detaining will be the same as by law it would have been if this Act had not passed, and the directions in the order should be to that effect, following the words of the statute. With regard to the time it is to be observed, that when the effect of sect. 57 is suspended by the order of an assessor appointed under sect. 72, the time will, in the first instance, be such as the "court" can commit for; if the time be extended by the order of the assessor, that order will operate as a protection for detaining beyond the time named in the order of the court, as well as a protection for the original taking. It must be recollected that the order for taking the debtor in execution, casts upon him the stigma of fraud, and thereby inflicts upon him a severe punishment; so that an order that a debtor be detained "for such time as he might have been if this Act had not passed," will have an effect more calamitous and lasting than an order for detention for an equal period, made before the Act passed.

Or for any time not exceeding six calendar months in any case in which the time for which a person taken in execution under process issuing out of any such court, could lawfully be detained in custody, according to the constitution of the said court before the passing of this Act, is less than six calendar months. (*a*)

The maximum of time for which the debtor shall be detained under an order of a judge made in exercise of the

(*a*) It has been asked, with reference to the section under consideration, "As section 57 positively declares that no one 'shall be taken or charged in execution' for a debt not exceeding 20*l*., how is the sheriff or other officer to be *compelled* to take the debtor, though the creditor do issue execution on such order?" * But would this question have been suggested if the distinction between debt or case for escape, and trespass to the person, had

* Horry's Law and Practice of Insolvent Debtors, 60.

power conferred by sect. 59, shall be six months, in all cases in which an order for execution against the person of a debtor, issuing out of the court to which the judge belongs, could not have availed for detaining the debtor in execution so long as six months. The minimum, as we have seen, is the period for which the debtor might have been detained had this Act not passed, and such will be the period, in every case, in which the assessor shall content himself with simply removing the prohibition imposed by sect. 57. After what has been said about the effect of the order on the character of the debtor,—an effect which will be permanent, for even the payment of the debt will not obliterate the stain which the order will leave,—it is believed that an order for detaining a debtor six months will be made in the extremest cases only by a judge of a court for the recovery of small debts.

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been borne in mind? By the very terms it seems to be conceded that if the order be a good one, it may be obeyed; that can only be because, being good, it would be an answer for proceedings taken to obtain redress for the execution of it. If the order, being good, may be obeyed, it must be obeyed; for there exists, either the duty of obeying it in every case if it be good, or the duty of disobeying it in any case however good. If an officer is protected, he is bound to obey the order of the court.

In the case of *Painter* v. *The Liverpool Gas Company*, 3 A. & E. 433, *Lord Denman*, C. J. said:—"A warrant is a justification to officers, because they are not to canvass the legality of the process they have to execute. Acts of Parliament have been passed for their protection, founded on that principle, and it is a good one; for it would be absurd that an officer charged with the execution of a warrant should have to pause and consider whether it was regularly issued or not." And *Patteson*, J. said: "The reason for which such a warrant, though irregular, shall be a protection to an officer, is, that he would not be entitled to set up his private opinion against that of the justice, as to the goodness of the warrant. He is bound to obey it, and is therefore protected in doing so." Again the liability of the officer seems to arise on the ill-execution of a legal order, *Sewell* v. *Champion*, 6 A. & E. 407, and not for the execution of an illegal order. If, on the other hand, an officer is not protected by the fact that he is an officer obeying an order of the court, he will at all events, be protected by the fact that he is an officer obeying a legal order of the court. Protection and obedience are correlative: when the officer is protected, he is bound to obey. It is apprehended, then, that there will not be any difficulty in compelling obedience to an order for taking a defendant and detaining him in execution "in like manner .... as he might have been if this Act had not passed," greater than there has heretofore been in enforcing an order for execution against the person. At all events, even if there be not some process of compulsion more direct and rapid, an action on the case for negligence would, it should seem, lie against the proper officer who should refuse to execute the writ.* Under some of the local Acts the process of compulsion will be short enough, when the order of the assessor removes the bar to the execution of the order of the court; and if when the defendant is once in prison the officer refuse to detain him for the whole time mentioned in the assessor's order, he will be liable for an escape. The difficulty, under a Court of Requests' Act would lie, not with the officer, but with the clerk, and would, it is conceived, in any case be removed by reference to *Aldridge* v. *Haines*, 2 B. & Ad. 395; *Andrews* v. *Morris*, 1 G. & D. 268; *Garratt* v. *Morley*, 1 G. & D. 275.

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* *Archbold's* Nisi Prius, 431.

Whether or not execution against the goods and chattels of such defendant shall have issued as hereinafter provided.

This was rendered necessary by the 7th section of the 26th Geo. 3, c. 38, which enacts—

"That it shall not be lawful for any such court or commissioners to issue any process against the body or bodies of any person or persons, where the party entitled to the benefit of any order, judgment, or service, shall at the same time have obtained any warrant or process against the goods and chattels of the same person or persons." A similar provision is contained in several local Acts.

The order cannot remain in force after the judgment has been satisfied. It is assumed, however, that the order for taking and detaining in execution will involve a direction about the costs, and therefore that without the payment of them, the judgment cannot be satisfied.

But it is only when the excution "shall have issued as *hereinafter* provided" that the operation of the 26th Geo. 3, c. 38, or of any similar provision expressly embodied in a local Act, will be defeated. We shall see directly (sect. 60) that the execution thereinafter provided, is to issue "whenever the judge of any such court shall have made an order for the payment of money." This Act does not empower the "judge" to make an order *for the payment of money*. It is clear then that this concluding provision of sect. 59 does not extend to orders made by judges whose authority is derived solely from sect. 72.

CHAPTER II.

OF THE REMEDIES AGAINST THE PROPERTY OF DEBTORS GIVEN TO THE JUDGMENT CREDITOR BY THE STATUTE 7 & 8 VICT. c. 96.

We have already seen that the judge who has tried a cause in which it was sought to recover a debt, may, though a sum not exceeding 20*l.* only has been recovered, under certain conditions, order that the defendant may be taken and detained in custody, whether execution have or have not issued against the goods and chattels of the defendant as in this act provided. The stat. 26 Geo. 3, c. 38, s. 7, has declared that process shall not issue from any court for the recovery of small debts against the body or bodies of any person or persons, where the party entitled to the benefit of any order, judgment, or decree, shall at the same time have obtained any warrant or process against the goods and chattels of the same person or persons. Now the 60th section of the statute 7 & 8 Vict. c. 96, enacts, "That whenever the judge of any such court shall have made an order for the payment of money, the amount shall be recoverable, in case of default or failure of payment thereof, forthwith, or at the time or times and in the manner thereby directed, by execution against the goods and chattels of the party against whom such order shall be made; and the clerk of the said court at the request of the party prosecuting such order, shall issue, under the seal of the court, a writ of *fieri facias*, as a warrant of execution to one of the bailiffs of the court, who by such warrant shall be empowered to levy, by distress and sale of the goods and chattels of such party within the jurisdiction of the said court, such sum of money as shall be so ordered, and also the costs of the execution; and all constables and other peace officers within their several jurisdictions shall aid in the execution of every such warrant." So that for the particular cases to which section 59 shall be applicable, and when the "judge" shall have made the order, the creditor will henceforward have the remedies of process against the goods, and process against the person. The powers given by the 59th section are to be exercised by the "judge who shall try such case, being either a judge of one of the supe-

rior courts, or a barrister or attorney-at-law." Section 60 provides for the case of an order for the payment of money, "either forthwith, or at the time or times and in the manner thereby directed," made by "the judge of any such court," and it directs that the "*clerk* of the said court," &c. Now "any such court" means, it is apprehended, any court described in section 57; and therefore "courts of requests" are included. For the meaning of the word "judge," we must look to the interpretation clause; and there we find that it, "as applied to any court for the recovery of small debts, shall mean and include the county clerk, judge, steward, and assessor, or the person holding or presiding in such court." We have already observed, that according to ordinary rules of construction, the general words, "the person holding or presiding in such court," will be construed to denote some functionary, *ejusdem generis* with county clerk, judge, steward, and assessor. Hereafter, and in respect of another section, we shall endeavour to show that "the judge" must be the same with the judge entitled to exercise the powers conferred by section 59. For the present it will be sufficient to say, that the "judge" within the meaning of this section must be the county clerk, steward, assessor, or the individual to whom the law has given the right, and on whom it has imposed the duty, of holding the court or presiding in it. But the stat. 7 & 8 Vict. c. 96, does not give a judge appointed under section 72, authority to make any order for the payment of money; it is clear, therefore, that this section does not apply to courts of requests not heretofore presided over by a "judge" within the meaning of this act, unless the jurisdiction of those courts have been extended by the 8 & 9 Vict. c 127, s. 9.

The clerk of the court, it will be observed, is to issue the writ of *fi. fa.* "at the request of the party prosecuting such order;" it will not therefore be necessary, it is presumed, for the clerk of the court, when the order is for payment forthwith, or does not specify a time for payment, to satisfy himself that there has been default and failure of payment.

It has been observed that the judgment creditors will, in certain cases, have remedies against the person and against the goods of the debtor. But when under the operation of section 59, the remedy against the person is given and enforced,—the debtor will be "taken and detained in *execution*" for a certain time in the order to be specified. The order under section 59 will be in fact a *ca. sa.*, and will be a bar to all other remedies during the life of the debtor taken in execution. Although, therefore, the order for taking the person of the debtor in execution may issue,

albeit process have also issued against his goods, the judgment creditor must recollect that process against the goods must not be enforced after the order for taking and detaining in execution has been put into operation.

The 61st section of the statute under consideration is in these words:—

"And be it enacted, That if the judge of any such court shall have made any order for payment of any sum of money by instalments, execution upon such order shall not issue against the party until after default in payment of some instalment according to such order, and execution or successive executions may then issue for the whole of the said sum of money and costs then remaining unpaid, or for each successive instalment and costs remaining from time to time unpaid, as the judge shall order, either at the time of making the original order, or at any subsequent time under the seal of the court."

If, then, the order for the payment of any sum of money direct that it be paid by instalments, it will be incumbent on the clerk not to let the party presenting such order have the writ of *fi. fa.* until after the time when some instalment should have been paid. In case of default, and of provision not having been made for such an event at the time the original order was made, the judge may make a special order under the seal of the court, directing that execution issue, either for the whole sum of money and costs then remaining unpaid; or for each successive instalment and costs remaining from time to time unpaid. It appears also that he can make such an order at any time subsequent to the time of making the original order, if there be not such a provision in it. A power to alter the amount of instalments once fixed does not appear to exist.

The words of this section, it will have been observed, are "execution upon such order shall not issue against *the party* until after default in payment," &c. In section 60 the words are, "execution against the goods and chattels of the party." Now, when an order under section 59 takes effect, the defendant is to "be taken and detained in execution." It would appear, therefore, that when the judge has made an order for payment of money by instalments, an order permitting the taking in execution upon the judgment in that cause cannot take effect until after default in payment of some instalment. This confirms the remarks that have been already made, see p. 4, *ante*. This section, also, is applicable only when the "judge" has the power to make an order for the payment of money, which an assessor appointed under sect. 72 has not necessarily.

By the 62nd section of the statute under consideration, it is enacted,—

"That if it shall at any time appear to the satisfaction of the judge of any such court, by the oath or affirmation of any person, or otherwise, that any defendant is unable, from sickness or unavoidable accident, to pay and discharge the debt or damages recovered against him, or any instalment thereof ordered to be paid as aforesaid, it shall be lawful for the judge, in his discretion, to suspend or stay any judgment, order, or execution given, made, or issued in such action for such time as the judge shall think fit, and so from time to time until it shall appear, by the like proof as aforesaid, that such temporary cause of disability has ceased."

The phrase "judge of any such court," appears again. "Any such court," means any court described in section 57. The judge is empowered to "suspend or stay any judgment," order, or execution, given, made, or issued; therefore, also to suspend or stay an order made under the 59th section by the judge who tried the cause, to the validity of which order it was necessary that the judge by whom it was made should be, if not "judge of one of the superior courts," "a barrister or attorney-at-law." Now, it is obviously one of the ends of the Act that the powers conferred by it should be exercised in courts for the recovery of small debts by a judge who shall be a barrister-at-law, as the preamble to section 72 abundantly shows. The interpretation clause directs that the provisions of the Act shall be construed in the most beneficial manner for promoting the end intended by it. The manner of construing the section under consideration most beneficial for promoting the ends of the Act, will be one that shall prevent the order of a judge, who is a barrister or attorney-at-law, from being stayed or suspended by a person not a lawyer. The inference, then, is that the legislature intended the "judge" in this section to be at the least a barrister or attorney-at-law; and therefore that the chairman or person accidentally presiding cannot have been designated by the word "judge" in this section.

The power may be exercised at "any time," if it appear to the satisfaction of the judge, "by the oath or affirmation of any person, or otherwise;"—that is, if, when he has power to administer an oath or receive an affirmation, it appear to the judge, by the oath or affirmation of any person,—or if it be made to appear to him in some other manner, when he will not be able to receive satisfaction on the subject by the oath or affirmation of any person.

Sickness or unavoidable accident.

If sickness prevents a man from paying his debts, it can only be because the power of paying depends on his being

able to work. If, again, inability to work be a reason why execution should be suspended, inability to procure work ought in like manner to be a like reason. It would appear then that the sudden and unforeseen discharge from his situation of a man living on wages or a salary, would be an "unavoidable accident" within the meaning of this section, if the debt was within the reasonable means of the debtor to pay, had he not been suddenly discharged. If this be so, this section furnishes a suggestion for the construction to be put on the phrase "reasonable assurance," &c. in the 59th section. The exercise of the powers given by this section, is entirely in the discretion of the judge; and they, it is apprehended, extend to suspension or stay of a judgment given, an order made, or an execution issued, but not to the discharge of a person actually taken and detained in execution. The judge may suspend or stay the order for a given time absolutely, and so on from time to time; but it is believed that he will, on each occasion that an application for further suspension shall be made, require proof that the disability continues. The judge may suspend, &c., from time to time, "until it shall appear by the like proof as aforesaid, that such temporary cause of disability has ceased." The whole matter being in the discretion of the judge, it will be advisable, that he require notice to be given to the plaintiff in every case, whether the application be for an original order of suspension, or for the renewal of such an order; for it is clear that the plaintiff ought to be permitted, on each occasion, to disprove the disability if he can. It will have been remarked, that the phrase in the last paragraph of the section is "temporary disability;" a disability, therefore, that appears to be permanent will not entitle the debtor, against whom fraud and recklessness have been proved, to demand a suspension of the order for taking him in execution.

The 60th and 61st sections contain, as we have already seen, directions for the issue of execution. An order to suspend or stay execution under the 62nd section, will be a protection to the clerk, who, in obedience to it, shall refuse to furnish the creditor with the means of enforcing his judgment. The clerk therefore should take care that the order is sufficient for that purpose; that is—1st, that it be made by "the judge;" 2nd, that it recite the fact that it has appeared to his satisfaction, &c., on oath or affirmation or otherwise, as the case may be; 3rd, that it find the defendant unable to pay from sickness or unavoidable accident, amounting to temporary disability; 4th, that it suspend or stay the judgment given, order made, or execution issued, or any two, or all three of them, as the case may be: 5th, for a time certain and specific.

The 63rd section of the statute which we are considering enacts,—

"That in or upon every such warrant of execution issued against the goods and chattels of any person whomsoever, the clerk of the court shall cause to be inserted or indorsed the sum of money and costs adjudged, with the increased costs allowed for such execution; and if the party against whom such execution shall be issued shall, before an actual sale of the goods and chattels, pay or cause to be paid or tendered unto the clerk of the said court, or to the bailiff holding the warrant of execution, such sum of money and costs as aforesaid, or such part thereof as the person entitled thereto shall agree to accept in full of his debt or damages and costs, together with such fees as shall have been lawfully incurred by him in the suit on which such execution issued, the execution shall be superseded."

An order for taking and detaining in execution under sect. 59, is therefore superseded also.

The 64th section enacts, "That in case any bailiff of any such court who shall be empowered to levy any execution against goods and chattels shall, by wilful or notorious neglect or connivance or omission, lose the opportunity of levying any such execution, then, upon complaint of the party aggrieved by reason of such neglect, connivance, or omission, (and the fact alleged being proved to the satisfaction of the court out of which execution issued, on the oath of any credible witness,) the judge shall order such bailiff to pay such damages as it shall appear that the plaintiff has sustained thereby, not exceeding in any case the sum of money for which the said execution issued, and the bailiff shall be liable thereto, and upon demand made thereof, and on his refusal so to pay and satisfy the same, it may be recovered against him by such ways and means as are provided for the recovery of debts adjudged in the said court."

In this section we find the words "on the oath of any credible witness," from which we may infer that the omission from some of the preceding sections, of a power to administer oaths, and of words directing certain matters to be proved on oath, was not accidental. The power to administer an oath, even in this matter, is not given to the judge. The fact alleged must, however, be proved to the satisfaction of "the court," which has power to administer the oath. When the judge "shall act alone with all the powers of the court," under the 8 & 9 Vict. c. 127, s. 11, he will of course have power to administer the oath.

"The fact alleged," it is apprehended, means the wilful or notorious neglect or connivance or omission by a bailiff of such court, *and* the loss of the opportunity to levy the

execution against the goods and chattels. The order of the judge for payment by the bailiff must recite the judgment and the issue of execution, and find the fact alleged according to this interpretation, the complaint of the party aggrieved thereby, the proof on oath of a credible witness, and the amount of damages sustained by the plaintiff, which it is clear cannot "exceed the sum of money for which the execution issued." Finally, it must order the bailiff to pay the sum so found.

The provisions of section 59 cannot, it is submitted, be used for the purpose of taking the bailiff in execution, on an order made under section 64. For though he have "wilfully" incurred the liability, yet the order under section 59 must be made by a judge, "who shall try such cause;" and the words "such cause" apply only to the causes contemplated by section 57. It is obvious that the damages actually sustained through the misconduct of the bailiff, cannot be easily ascertained, nor, save by the operation of extraordinary power specially conferred by the legislature, without the intervention of a jury. Moreover, the judge under section 59 can only order a "defendant" to be taken in execution, and the defendant in a cause, which a bailiff against whom a complaint of misconduct has been made could hardly be said to be. Moreover, as bailiffs are persons of some substance, the necessity of applying section 59 can scarcely have been contemplated.

It has been observed, that the fact must be proved to the satisfaction of "the court:" now the order is to be made by "the judge;" so that, if the "judge" be distinct from the "court," the consent of the "court" is necessary.

By section 65 it is enacted,—

"That if any bailiff or officer of any such court, acting under colour or pretence of the process of the said court, shall be charged with extortion or misconduct, or with not duly paying or accounting for any money levied by him under the authority of the court, it shall be lawful for the judge to inquire into such matter in a summary way, and for that purpose to summon and enforce the attendance of all necessary parties in like manner as the attendance of witnesses in any suit before him may be enforced, and to make such order thereupon for the repayment of any money extorted, or for the due payment of any money so levied as aforesaid, and for the payment of such damages and costs, as he shall think just; and in default of payment of any money so ordered to be paid, the same may be recovered by such ways and means as are provided for the recovery of debts adjudged in the said court." (*a*)

(*a*) See also 7 & 8 Vict. c. 19, s. 2.

It does not appear to be compulsory on the judge to exercise the power given him by this section, unless, indeed, the passage from the interpretation clause so often referred to, and the fact that the determination of the whole matter by the court for the recovery of small debts, when that is possible, is an end intended by the Act, give a compulsory character to the words "it shall be lawful," which in general are directory only. "The judge may inquire into such matter in a summary way," that is, it is presumed, on the instant; he may summon and enforce the attendance of witnesses; but it does not appear that he may administer an oath to them. It is probable that the passage in the interpretation clause just alluded to, would be held to justify the judge in using any means possessed by him for compelling answers from the witnesses when their attendance was enforced, but it is very much to be doubted, whether it could be construed to justify him in administering an oath to the witnesses. An order made under this section must find—that the person was bailiff of the court;—that he was acting under colour or pretence of the process of the said court;—extortion or misconduct, or the fact that he has not duly paid or accounted for money levied by him under the authority of the court; it must then recite the inquiry and the attendance of the necessary parties; lastly, it must order repayment, or due payment, or both, in accordance with the facts before found, and payment of damages and costs.

For the same reasons that were urged when section 64 was under consideration, it is submitted that the powers given by the 59th section are not available for compelling an order for payment made under section 65.

Section 66 enacts,—

"That every sale of goods which shall be taken in execution under process issuing from any such court for the recovery of small debts shall be taken to be within all the provisions of an Act passed in the eighth year of the reign of king *George* the Fourth, intituled *An Act to extend the provisions of an Act made in the fifty-seventh year of King* George *the Third, for regulating the costs of certain distresses.*"

By 7 & 8 Geo. 4, c. 17, all the rules and regulations, clauses, provisions, penalties, matters, and things in the 57 Geo. 3, c. 93, contained, are extended, so far as the same are applicable and capable of being put in execution with respect to distresses for land-tax, assessed taxes, poor's-rates, church-rates, tithes, highway-rates, sewer-rates, or any other rates, taxes, impositions, or assessments whatsoever, in all cases where the sum demanded or due for or in respect of such taxes, rates, tithes, assessments, or impositions, shall not exceed 20*l.*

By the 57 Geo. 3, c. 93, no person whosoever, making or employed in making or doing any act whatsoever, in the course of any distress for rent, where the sum due shall not exceed 20*l.*, shall take or receive out of the produce of the goods distrained, or from the tenant distrained on, or from the landlord, or from any other person whatsoever, any more costs and charges for and in respect of such distress, or any matter or thing done therein, than such as are fixed by the following schedule: and no person whatsoever shall make any charge whatsoever, for any act, matter or thing mentioned in the schedule, unless it shall have been really done.

SCHEDULE.

	£.	*s.*	*d.*
Levying distress - - - - -	0	3	0
Man in possession, per day - - -	0	2	6
Appraisement, whether by one broker or more, sixpence in the pound on the value of the goods.			
Stamp, the lawful amount thereof.			
All expenses of advertisement, if any, each	0	10	0
Catalogues, sale, and commission, and delivery of goods, one shilling in the pound on the net produce of the sale.			

By ss. 2 & 4, a party aggrieved by any such practice may apply to a justice of the peace, who may adjudge treble the amount of money unlawfully taken to be paid with costs, which may be levied by distress; and if the complaint be unfounded, may give costs to the party complained against; no judgment is to be given against any landlord, unless he personally levies the distress.

By s. 6, brokers or persons who shall make or levy any distress must give copies of all their charges, and of all the costs, signed by them, to the persons whose goods are distrained, although the amount of rent demanded shall exceed 20*l.*

The 67th section of stat. 7 & 8 Vict. c. 96, enacts,—

"That no landlord of any tenement let at a weekly rent shall have any claim or lien upon any goods taken in execution under the process of any court of law for more than four weeks arrears of rent; and if such tenement shall be let for any other term less than a year the landlord shall not have any claim or lien on such goods for more than the arrears of rent accruing during four such terms or times of payment."

The statute 8 Anne, c. 14, enacts, that the goods, &c. shall not be taken in execution on any pretence whatsoever, "unless the party at whose suit the execution is sued out

shall, before the removal of such goods from off the said premises, by virtue of such execution or settlement, pay to the landlord of the said premises, or his bailiff, all rent due for the said premises at the time of the taking such goods or chattels by virtue of such execution: provided the said arrears of rent do not amount to more than one year's rent; and in case the said arrears shall exceed one year's rent, then the said party, at whose suit such execution is sued out, paying the said landlord or his bailiff one year's rent, may proceed to execute his judgment, as he might have done before the passing of the Act; and the sheriff or other officer is empowered and required to levy and pay to the plaintiff, as well the money so paid for rent as the execution money." The statute of Anne is not repealed. The 67th section of the statute under immediate consideration, enacts, that the landlord shall not have a claim or lien on the goods and chattels of his tenant, for more than the arrears accruing during four terms or times of payment, when the tenement is let by the week, or for any other term less than a year. It is intended that both statutes shall operate. It is conceived, then, that if the four terms exceed a year, the party at whose suit the execution is sued out, upon paying the landlord or his bailiff one year's rent, may proceed to execute his judgment. The section does not say that payment shall be made absolutely for four such terms, before the judgment can be executed; it merely says what the utmost lien of the landlord for arrears of rent shall be, when he lets for a term less than a year, and it leaves the law, that is, the statute of Anne, to take its course. It is one thing to say that a man shall not receive the arrears accruing during more than four such terms, and another to say that he shall receive absolutely the arrears accruing during four such terms. At all events, the recovery by the creditor of the sum ordered to be paid by the court, is an end of the act; and the receipt by a landlord of the arrears of rent accruing during four terms of payment, when the tenement is let for less than a year, is not an end of the act; and therefore, it is submitted, in reliance on the paragraph in the interpretation clause, the construction contended for will be supported.

By the 68th section of the 7 & 8 Vict. c. 96, it is enacted,—

"That if any claim shall be made to or in respect of any goods or chattels taken in execution under the process of any court for the recovery of small debts, or in respect of the proceeds or value thereof, by any landlord for rent, or by any person not being the party against whom such process has issued, it shall be lawful for the clerk of the court out of which such execution issued, upon application

of the officer charged with the execution of such process, either before or after any action brought against such officer, to issue a summons calling before the court out of which such execution issued both the party issuing such process and the party making such claim, and thereupon any action which shall have been brought in any of Her Majesty's superior courts at *Westminster*, or in the court of Common Pleas at *Lancaster*, or in any local or inferior court, in respect of such claim, shall be stayed; and the court in which such action shall have been brought, or any judge thereof, on proof of the issue of such summons, and that the goods and chattels were so taken in execution, may order the party bringing such action to pay the costs of all proceedings had upon such action after the issue of such summons; and the judge of the court for the recovery of small debts out of which such execution issued, shall adjudicate upon such claim, and make such order between the parties in respect thereof, and of the costs of the proceedings, as to him shall seem fit; and such order shall be enforced in like manner as any order made in any suit brought in such court."

In examining this paragraph we will leave out of present consideration those words of it which relate to proceedings in courts other than that out of which execution issues.

That if any claim shall be made to or in respect of any goods or chattels taken in execution.

The claim may be to the goods and chattels absolutely or qualifiedly, as they may chance to belong either to the claimant altogether, or to him jointly with the debtor, or to him or to the debtor conditionally, as in the cases of pledge or deposit. The words "goods or chattels" include every species of property that can be taken in execution; therefore, money, or bank notes, cheques, bills of exchange, promissory notes, bonds, specialties, or other securities for money. (*a*)

Or in respect of the proceeds or value thereof, by any landlord for rent, or by a person not being the party against whom such process has issued.

The claim may be to the goods themselves, or for the proceeds, or a portion of them, when sold, realized, or recovered; or the claim may be, even when the ownership of the claimant is qualified only, for the prevention of the sale, realization, or recovery.

(*a*) Stat. 1 & 2 Vict. c. 110, s. 12.

The claim of a landlord is for his rent, within the limits fixed by section 67, and the statute 8 Anne, c. 14. It would appear that the rent must be paid if the officer have notice of the landlord's claim, at any time while the goods or proceeds remain in his hands; (*a*) but that the officer is not bound to find out what rent is due to a landlord, and to pay it to him, unless the landlord gives him notice, (*b*) though if the officer know that rent is due, and proceeds to sell the tenant's goods under a *fi. fa.*, without retaining a year's rent, he will be liable, even though specific notice has not been given to him. (*c*)

The claim may be made by any person not being the party against whom such process has issued. It may happen that the debtor has a fiduciary ownership in the chattels. In that case, it is presumed the party beneficially interested, or his next friend, would be permitted to make the claim, which will be one, not to the goods or chattels, but "in respect of" the goods or chattels. In such a case, which may involve the transmission to children of articles of little intrinsic value, but, from associations connected with them, altogether priceless, every facility for making the claim should be offered.

It shall be lawful for the clerk of the court out of which such execution issued, upon application of the officer charged with the execution of such process.

The application of the officer is a condition precedent to the doing any thing by the clerk of the court. The words "it shall be lawful," are directory only. It will therefore be prudent in claimants not to put forward any demands which they cannot support in some other court that will have jurisdiction over the claim, if the clerk do not comply with the application of the officer, or the officer do not make an application to the clerk; for to their remedy in that court they may chance to be left.

Either before or after any action brought against such officer.

The discretion of the officer to make an application to the clerk, and that of the clerk to issue a summons, may be exercised before or after any action "brought" against such officer. The effect of the phrase "upon the application of the officer," is to give him the choice of jurisdictions, either that of the court out of which the process has issued, or that of the courts, or one of them, from which the claim-

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(*a*) *Arnett* v. *Garnett*, 3 B. & A. 440.

(*b*) *Smith* v. *Russell*, 3 Taunt. 400.

(*c*) *Andrews* v. *Dixon*, 3 B. & A 645.

ant may seek redress, if the officer choose that he shall not have it from the court out of which the process has issued. But though he has the choice of one of such jurisdictions, he must not have the choice of a decision in his favour by more than one. (*a*) This being so, the question arises, when must the choice be made? Now, it would be manifestly unjust, and certainly irreconcileable with the principles of the case in which the position just enounced was judicially confirmed, to allow the officer to defer his application to the last moment—to the moment of trial in fact—and then, after so much expense has been incurred, to produce the summons of the clerk as a bar to the determination of the case by the ordinary tribunal. Infinitely more oppressive and unjust would it be to allow the clerk, in the exercise of his discretion, to defer the issue of the summons until just before the trial of the case. It is submitted, therefore, that to prevent such injustice, it will be held requisite that the words "action brought" be construed strictly; and that the officer make his election, and the clerk issue the summons on action brought, at the latest,—that is, if the plaintiff has given distinct notice of his claim, before any of the proceedings consequent on the mere bringing the action can in the regular course of business take place—before, in fact, the plaintiff can enter an appearance for the defendant, if he have failed to appear. If the plaintiff has not given distinct notice of his claim before action brought, or at the time thereof, it is presumed the officer and clerk must elect so soon as the nature of the claim is made known to them.

To issue a summons calling before the court, out of which such execution issued, both the party issuing such process and the party making such claim.

The summons, it is conceived, must be addressed to both parties who are to be called before the court, and it should specify accurately the title of the cause, the order of the judge thereon, the issue of execution, the issue of process, the seizure, the sale (if any) with its results, and the claim; and also, if an action has been brought, a recital of that fact, and the title of the cause.

And the judge of the court for the recovery of small debts out of which such execution issued, shall adjudicate upon such claim, and make such order between the parties in respect thereof, and of the costs of the proceedings, as to him shall seem fit.

The assessor alone will have authority, under this section,

(*a*) *The Queen* v. *The Justices of Ripon*, 1 N. S. C. p. 292. 8 Justice of the Peace, 537.

to adjudicate finally on all conflicting claims to property taken in execution under process from the court. This may at first appear doubtful; but the power is given to the "judge" of the court; the interpretation clause says, that the word "judge," as applied to any court for the recovery of small debts, shall mean and include the county clerk, judge, steward and assessor, or the person holding or presiding in such court,—the singular number only being used; the interpretation clause says also, that the Act shall be construed in the most beneficial manner for promoting the ends intended by it; the 72nd section shows that adjudication by a person of legal skill, and the removability of such person by the Secretary of State for incompetence or misbehaviour, are ends intended by the Act, so far as the powers created by it are concerned; from all which the inference is, that the word "judge," in the 68th section, indicates the assessor to be appointed under the 72nd section, unless the court have by its very constitution a president of the legal profession. But for that tendency to usurp jurisdiction which is found to be inherent in all tribunals it would be difficult to conceive how any body of reasonable men could imagine that the legislature intended to confer authority over matters so complex on a lay chairman—the mere creature of accident or courtesy.

Power is not given to administer an oath, nor to examine on oath.

The words are, "*shall* adjudicate and make such order," &c. The judge, therefore, must hear the matter, and must make a final order in it between the parties in respect of the claim. He must also make an order in respect "of the costs of the proceedings;" that is, of the "proceedings" in his court. He will not, it is conceived, be at liberty, when an action has been brought, to give the costs of the writ against the bailiff, even though the claim should be of a nature that should have induced him to apply at once for a summons. This, and the fact that the court in which the action may be brought will not have authority to give costs other than those "of all proceedings had upon such action *after* the issue of such summons," are additional reasons for the belief that the officer and clerk will be compelled to exercise each his respective discretion as to the issue of the summons immediately on action brought, if he see that in respect of such claim the action has been brought.

As to him shall seem fit.

Before adverting to some of the rules by which the discretion of the judges who shall apply this section in practice, will in all probability be governed, it may not be

improper to repeat, that the object of the several sections, 57 to 70, of the stat. 7 & 8 Vict. c. 96, differs from that of the statutes that relate to bankruptcy and to insolvency. While the object common to the statutes last referred to is the surrender of all the property of the bankrupt or insolvent for equitable division among his creditors, the object of the statute which is more immediately under consideration is the satisfaction of a judgment debt, not exceeding 20*l*., out of the goods and chattels of the debtor, if not voluntarily, at least by means of executions against his property. So that there be not any fraudulent sale, transfer, gift, delivery, removal, or concealment of property really belonging to the debtor, a fraud against the spirit of these sections will not be committed; for with respect to actual dealing with his property, it is only on account of having dealt with it in one of those modes that, by the provisions of section 59, a judge can order that a debtor may be taken and detained in execution. The bankrupt laws, on the other hand, require that there be delivered up for division among the creditors any goods and chattels which the bankrupt or petitioner, at the time of his becoming a bankrupt or filing his petition, shall, by the consent and permission of the true owners thereof, have in his possession, order, or disposition, or whereof he at such time may be the reputed owner, or whereof he has taken upon himself the sale, alteration, or disposition, as owner. The object of this is said to be, to prevent a trader from acquiring a false and delusive credit to the deception of others, by an apparent property in goods which do not belong to him. This object certainly differs from that of preventing the failure, by reason of fraudulent sale, &c., of an execution against the goods and chattels of a debtor. Be that as it may, it is clear that the framers of the bankrupt laws have considered express words necessary for putting the property of one man at the mercy of the creditors of another, because that property has been in the order, disposition, or reputed ownership of the latter. It is submitted, then, that the decisions under the bankrupt laws on the subject of reputed ownership, often raising the question whether goods shall be followed, will not be necessarily of paramount authority in the disputes raised relative to goods in the actual possession of the debtor, which the judge of a court for the recovery of small debts is by section 68 empowered to settle. It is conceived, however, that they will be of authority to this extent, that all dealings which would be protected under the bankrupt and insolvent laws, should *à fortiori* be protected and maintained inviolable under those sections of the statute 7 & 8 Vict. c. 96, which we have been considering. If this be so, the following observations of Mr. Cooke

(*a*) will be found worthy of attention:—"The possession of the goods and chattels, to come within the statute, must be with the *consent* of the true owner; therefore the property of infants, incapable of consenting, is not within its operation. Neither is property within the statute which has been obtained by fraud, nor when it is in the possession of the party for a special purpose in the capacity of trustee, factor, or banker, nor when it is in his possession merely for safe custody, and not mixed up with the party's own property. To give effect to the statute, the party must also be the reputed owner of the property. Reputation is a question of fact which will admit of evidence on both sides. It is not, therefore, sufficient that he should be merely in possession of the property, but his possession must be of such a nature that it shall appear to the world to be such as is consistent with actual ownership. This may be clear by his having taken upon himself 'the sale, alteration, or disposition' of the property as owner. But if a man be in possession of goods or chattels under an agreement which is *notorious in the neighbourhood, and known to his creditors,* the statute will not apply." (*b*)

It is a general rule in the transfer of chattels, that the possession must accompany and follow the deed; therefore, where the conveyance is absolute, the possession must be delivered immediately; where it is conditional, it will not be rendered void by the vendor's continuing in possession till the condition be performed. (*c*) So that, after a conveyance of goods and chattels, want of possession does not constitute fraud, as against creditors, but is only evidence of it. (*d*) Want of possession on a bill of sale is a notorious badge of fraud, which ought to be left to the jury; (*e*) but such a bill will not be void as against the vendor, even though it be not accompanied with the possession; nor as against a creditor, with whose knowledge and assent it was given. (*f*) If an assignment be made of household furniture, and the assignor continue in possession of it, it is not protected against an execution, at the suit of a creditor of the assignor, unless the assignment were notorious; in such cases, the notoriety of the change of possession is the fact to be ascertained. (*g*) Where a party who obtains a bill of sale takes possession under it, but suffers the late owner of the goods to interfere or execute any act of ownership, it shall avoid the bill of sale as against a subsequent *bonâ fide* execu-

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(*a*) Insolvent Debtor's Practice, 91, 2nd ed.

(*b*) *Muller* v. *Moss*, 1 M. & S. 335.

(*c*) *Edwards* v. *Harben*, 2 T. R. 587.

(*d*) *Martindale* v. *Booth*, 3 B. & Ad. 498.

(*e*) *Martin* v. *Podger*, 2 W. Bl. 302.

(*f*) *Steel* v. *Brown*, 1 Taunt. 381.

(*g*) *Armstrong* v. *Baldock*, Gow. 33; *Smith* v. *Russell*, 3 Taunt. 400.

tion. (*a*) And it is not enough that a person is put in to keep possession jointly with the assignor. (*b*) A conveyance of chattels unaccompanied with possession is void, although in the same instrument be contained a valid mortgage of leasehold buildings in which the chattels are situated. (*c*)

The exclusive object of the assignment of a bankrupt's property is, that it may be applied to the payment of his debts; nothing, therefore, passes which the bankrupt then holds in trust for others, or in which he has only a mere legal interest. The presumption arising from the bankrupt's possession of property at the time of the bankruptcy, is frequently capable of being answered and explained away by evidence which shows that possession was given up by the bankrupt, as far as the nature of the case admitted; or that there was not such a permissive possession as is contemplated by the statute; for the mere possession of the property by the bankrupt is not itself sufficient to enable the assignees to claim it for the creditors. (*d*) Where there is possession, without any wilful permission on the part of the owner, which may delude creditors, the case is not within the statute; as where, *first*, such possession is delivered as the circumstances of the case will permit; *secondly*, where the bankrupt has possession as executor or administrator, (*e*) or where the husband has possession of the separate property of the wife, (*f*) or has a mere temporary custody of it, or has the possession for such a purpose as excludes the presumption of ownership, and consequently where no delusion can arise, as where the bankrupt has possession as factor, (*g*) as bailee, or as banker, for a specific purpose. Property which is in the bankrupt's hands as trustee only, will not pass under the assignment to his assignees. (*h*) The proceeds of goods clothed with a trust for the payment of bills of exchange do not pass to assignees. (*i*) Goods of a testator or intestate, in the possession of a bankrupt as executor or administrator, (*j*) or money "which specifically can be distinguished and ascertained" as having belonged to the testator or intestate, will not pass to the assignees. (*k*) The statutes of bankruptcy and insolvency do not apply where the bankrupt or insolvent has only a mere qualified right to use the goods for a limited time. (*l*) Nor to war-

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(*a*) *Paget* v. *Perchard*, 1 Esp. 205.
(*b*) *Wardell* v. *Smith*, 1 Camp. 333.
(*c*) *Reed* v. *Blades*, 3 Taunt. 212; but see *Jones* v. *Smallpiece*, 2 B. & A. 351.
(*d*) 2 Stark. Ev. 109, 110.
(*e*) Ex p. *Marsh*, 1 Atk. 159.
(*f*) *Jarman* v. *Woollaton*, 3 T. R. 618.
(*g*) Ex p. *Chion*, 3 P. Wms. 127, *n*.
(*h*) *Winch* v. *Keeley*, 1 T. R. 619; *Smith* v. *Pickering*, Peake, 69; *Taylor* v. *Plumer*, 3 M. & S. 562.
(*i*) Ex p. *Ellis*, 1 Atk. 101.
(*j*) *Farr* v. *Newman*, 4 T. R. 621.
(*k*) *Per* Lord Mansfield in *Howard* v. *Jemmett*, 3 Burr. 1369; *Taylor* v. *Plumer*, 3 M. & S. 578.
(*l*) *Storer* v. *Fletcher*, 3 B. & C. 368.

rants representing property belonging to a true owner pledged by a bankrupt or insolvent with a third party. (*a*)

It has already been intimated, that the separate property of a wife, in the possession of the husband, does not pass to his assignees; but the property must be in settlement for her separate use and benefit; (*b*) and the possession must be consistent with the settlement. (*c*) A wife, too, is permitted under peculiar circumstances, to carry on trade for her own exclusive benefit; her stock in trade, and the benefits arising from it, not being subject to the claims of her husband's creditors: provided, that is, the husband abstain from all interference and control in the management of the business. (*d*) The paraphernalia of a wife are liable to the debts of her husband, for he is capable of disposing of them in his life time; and if a wife possessing a separate income, and residing with her husband, should from time to time purchase any articles of jewellery or furniture, such articles will be deemed to be the property of the husband, and the assignees will be entitled to them upon his discharge. The case will be different where the husband and wife are living separate and apart from each other, the wife supporting herself either by her own property, or having a settlement made upon her by her husband upon their separation. (*e*)

In respect of partnership property, it would appear that the interest of each partner is his share of the surplus, subject to all the partnership accounts, and that interest only is liable to the execution of a creditor. (*f*) If on an execution against one of two partners, the partnership's goods are taken and sold, the sheriff is to pay over to the other a share of the produce, proportioned to his share in the partnership effects. (*g*) If a writ of *fi. fa.* be sued out against one of several partners, for a debt due from him alone, there is great doubt as to what interest in the partnership's property can be sold by the sheriff. (*h*)

The husbandry provisions of the 56 Geo. 3, c. 50, must be attended to.

And such order shall be enforced in like manner as any order made in any suit brought in such court.

The court last named was "the court for the recovery of small debts;" by the words "such court," then, a court for the recovery of small debts must be understood. For the

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(*a*) *Greening* v. *Clarke*, 4 B. & C.
(*b*) *Jarman* v. *Woollaton*, 3 T. R. 618.
(*c*) *Ex parte Massey*, 2 M. & A. 173.
(*d*) *Roper's Law of Husband and Wife*, 2. 125; *Jarman* v. *Woollaton*, 3 T. R. 618.
(*e*) Cooke's Insolvent Practice, 93.
(*f*) *Dutton* v. *Morrison*, 17 Ves. Jun. 193.
(*g*) *Eddie* v. *Davison*, 2 Doug. 6
(*h*) 3 C. & P. 386.

reasons that have already been advanced, (p. 36,) it is believed that the provisions of section 59 cannot be made use of for enforcing an order made under section 68. The instrument last referred to must be accurately drawn up; for which purpose a recital of summons, of the appearance of the parties, or the default of one and the non-appearance of the other, as the case may be, and of the authority of the "judge," must be added to the requisites of the summons; these recitals concluded, there must be an adjudication and an order.

By section 69 it is enacted,—

"That where any distress shall be made for any sum of money to be levied by virtue of this Act, the distress itself shall not be deemed unlawful, nor the party making the same be deemed a trespasser, on account of any defect or want of form in the information, summons, conviction, warrant of distress, or other proceeding relating thereto; nor shall the party distraining be deemed a trespasser from the beginning, on account of any irregularity which shall afterwards be committed by the party so distraining, but the person aggrieved by such irregularity, may recover full satisfaction for the special damage in an action upon the case."

With regard to the words "shall not be deemed unlawful . . . . on account of any defect or want of form in," &c., it is to be observed, that in the case of a conviction, though an Act of parliament should use these much stronger words "that no conviction under this Act shall be set aside for want of form, or through the mistake of any fact, circumstance, or other matter, provided the material facts alledged be proved;" yet, notwithstanding these, or the like words, every material fact must be alleged, and the omission of any is not aided by reference to such clause. (*a*) The Act does not prescribe any particular forms as indispensable, so that compliance therewith would suffice; (*b*) but, as that which is in itself surplusage, and might be omitted altogether, does not vitiate the rest which is sound, (*c*) it is conceived that the difficulty of preparing proper documents will not be found very great.

The words "such irregularity" mean, it is presumed, the irregularity mentioned in the preceeding part of the clause, —"irregularity . . . . afterwards," that is, after the "beginning" . . . . committed by the party so distraining.

In concluding this portion of the subject, it may be proper to repeat the caution, that it will be most unsafe to omit from any order made under any of the sections that have been considered a distinct statement, that it has been made by a "judge" within the meaning of the interpretation clause, section 73.

(*a*) *R.* v. *Jukes*, 8 T. R. 539.
(*b*) *R.* v. *Jefferies*, 4 T. R. 767.
(*c*) *Ibid.*

CHAPTER III.

OF THE STATUTE 8 & 9 VICT. c. 127.

The statute 8 & 9 Vict. c. 127, is intituled "An Act for the better securing the payment of small debts." The object which the title indicates has been very consistently pursued, for the statute might be divided into two sets of sections, the one giving facilities to creditors for obtaining judgments against their debtors, the other giving facilities to judgment creditors for obtaining payment of the sums awarded to them by the judgments made in their favour. There is one clause which does not belong to the former class, and can scarcely be supposed to range within the other; it has been made in favour of prisoners desirous of making an affidavit to be used in matters of bankruptcy or insolvency, and enables them to swear affidavits before the visiting justices or the principal keeper of a prison. There is also another clause which no doubt was designed to belong to each class, but which it would be difficult for an unprejudiced person to include in either or to regard as beneficial to debtor or creditor. It is the 13th, and secures to the High Bailiff of *Westminster* or of *Southwark*, as the case may be, the execution of all process issuing out of any inferior court, the jurisdiction of which shall include his bailiwick or any part thereof. On each of these sections it will in the sequel be necessary to make a few remarks.

The 23rd section enacts, "That all the enactments of the said Act of the last session of Parliament"—and the sixth section shows that the 7 & 8 Vict. c. 96, is meant—shall be deemed to apply to every proceeding under this Act, so far as the same are applicable, and not repugnant to the provisions of this Act. It will be recollected that the 73rd section of the 7 & 8 Vict. c. 96, directs that "the provisions of the said recited Act, and of this Act shall be construed . . . . in the most beneficial manner for promoting the ends intended by the said recited Act and this Act." This provision, it is submitted, is not repugnant, and is applicable to proceedings under the Act which is now to be considered, and should be called in aid whenever difficulties of construction shall arise. In commenting on this statute, that method will be adopted which has already been pursued in discussing the provisions of the 7 & 8 Vict. c. 96.

The first section and the preamble are in these words :—

"Whereas it is expedient and just to give creditors a fur-
" ther remedy for the recovery of debts due to them : be
" it therefore enacted by the Queen's most excellent Ma-
" jesty, by and with the advice and consent of the lords
" spiritual and temporal, and commons, in this present par-
" liament assembled, and by the authority of the same, that
" if any person is or shall be indebted to any other in a
" sum not exceeding twenty pounds besides costs of suit,
" by force of any judgment obtained, or of any order for the
" payment thereof, or of any costs in any court, which
" judgment or order shall have been obtained from any court
" of competent jurisdiction in *England*, it shall be lawful
" for the creditor so having obtained a judgment or order
" to obtain a summons from any commissioner of the court
" of bankruptcy for the district in which such debtor shall
" reside or be, or from any court of requests or conscience,
" or inferior court of record for the recovery of debts, or
" other court for the recovery of small debts, within the
" jurisdiction of which such debtor shall reside or be, having
" a judge who shall be either a barrister-at-law, special
" pleader, or an attorney who shall have practised as an at-
" torney for not less than ten years in one of Her Majesty's
" superior courts of common law at *Westminster*, which
" summons such commissioner of the court of bankruptcy
" or such court shall be authorized and required to grant,
" according to the form in schedule (A) hereunto annexed
" upon the application of such creditor by any petition or
" note in writing, according to the form in schedule (B)
" hereunto annexed; and the debtor, appearing before such
" commissioner or court at the time to be appointed in such
" summons, shall be examined by the said commissioner or
" court, and shall, if the creditor think fit, be interrogated
" before such commissioner or court by the creditor sum-
" moning him, touching the manner and time of his con-
" tracting his debt, the means or prospect of payment he
" then had, the property or means of payment he still hath
" or may have, the disposal he may have made of any pro-
" perty since contracting such debt; and such creditor shall
" also, if such commissioner or court shall think fit, be ex-
" amined by the said commissioner or court touching his
" claim against the said debtor, and shall, if the debtor
" think fit, be interrogated before such commissioner or
" court by the said debtor touching the said claim against
" him; and it shall be lawful for such commissioner or
" court to make an order on the said debtor for the payment
" of his debt by instalments or otherwise; and in case such
" debtor shall not attend as required by the said summons,
" and shall not allege a sufficient excuse for not attending,

"or shall if attending refuse to disclose his property, or his transactions respecting the same, or respecting the contracting of the debt, or shall not make answer thereof to the satisfaction of the commissioner or court, or shall appear to such commissioner or court to have been guilty of fraud in contracting the debt, or of having wilfully contracted it without reasonable prospect of being able to pay it, or of having concealed or made away with his property in order to defeat his creditors, or if he appears to have the means of paying the same by instalments or otherwise, and shall not pay the same at such times as the commissioner or court shall order, or as the court shall have ordered in which the original judgment shall have been obtained or order made, then in any of the said cases it shall be lawful for such commissioner or the judge of such court to order such debtor to be committed, for any time not exceeding forty days, to the common gaol wherein the debtors under judgment and in execution of the superior courts of justice may be confined within the county, city, borough, or place in which such debtor shall be resident, or to any other gaol or debtors' prison within the same county, city, borough, or place which shall by any declaration of one of Her Majesty's principal secretaries of state be allowed as a place of imprisonment under this Act, so long as such declaration shall remain in force and unrevoked."

The remedies given by this statute are "further," additional, that is, to those which the parties to whom they are to be given already possess. They will therefore subsist independently of all others, and be unaffected by them, unless those remedies have extinguished the debt or the right to obtain satisfaction of it. It would seem that although Acts of Parliament be in *eâdem materiâ*, and even if there be words of incorporation, the court will be disposed so to construe them, as that the substantive provisions of each shall be in operation separately and independently. (*a*) Not only, then, will the statute 8 & 9 Vict. c. 127, exist separately from and independently of the 7 & 8 Vict. c. 96, but the statute last named will in every respect exist as a substantive self-contained enactment.

The word creditor has a well-ascertained legal meaning, which it is important to define. In the old book, "*Les Termes de la Loy*," the following definition is to be found :— "Creansor or creditor comes of the French *coryance*, that is, confidence or persuasion; and it signifies him that trusts another with any debt, be it money, wares or other things.

(*a*) *The Queen* v. *The Tithe Commissioners for England and Wales*, 9 J. P. 471.

This word is used in the old N. B. in the writ of *Audita querela*, f. 66, *a*."

"*Be it therefore enacted, &c., that if any person is or shall be indebted to any other in a sum not exceeding* 20*l.*, *besides costs of suit, by force of any judgment obtained, or of any order for the payment thereof, or of any costs in any court.*"

If "any person" is or shall be indebted to "any other." The interpretation clause, sect. 23, enacts, that "the word 'person' shall include a body corporate; and every word importing the singular number, or masculine gender, shall include several persons or things, and females as well as males, unless the context shall require another construction." As the section will only apply when there is a judgment debt or a debt in the nature of a judgment debt, it is not necessary to institute an inquiry into the liability of persons.

"Is or shall be" indebted; that is, indebted at the time the Act passed, or shall become indebted thereafter.

"*In a sum not exceeding* 20*l. besides costs of suit, by force of any judgment obtained, or of any order for the payment thereof, or of any costs in any court.*"

This is to be read *reddendo singula singulis*. Three cases are supposed; 1st, a judgment obtained for a sum not exceeding 20*l.* besides cost of suit; 2nd, an order for the payment of a sum not exceeding 20*l.*, besides costs of suit; 3rd, an order for the payment of a sum not exceeding 20*l.* for costs only. The word "thereof" must be taken to apply to "sum not exceeding 20*l.*" and the words "order for the payment" must be taken and understood to govern the words "of any costs in any court." What courts are meant appears from the clausule that immediately follows.

The 57th section of the 7 & 8 Vict. c. 96, throws light on the meaning of the phrase "besides costs of suit." It enacts, that "from and after the passing of this Act, no person shall be taken or charged in execution upon any judgment obtained in any of Her Majesty's superior courts, or in any county court, court of requests, or other inferior court, in any action for the recovery of any debt, wherein the sum recovered shall not exceed the sum of 20*l.*, exclusive of the costs recovered by such judgment." The phrase "exclusive of the costs recovered by such judgment" is also to be found in the 58th section, and is, by construction, included in the 59th, which provides a remedy for the recovery of such debt. Now the section under consideration

professes to provide a further remedy for the recovery of debts not exceeding 20*l*. It is not then a forced construction to say, that "besides costs of suit" means "exclusive of the costs recovered by such judgment." The effect of this construction will be to confine the remedy to judgments, or orders in the nature of judgments, and to exclude all rules and orders. It is submitted nevertheless, that such is the proper construction.

The governing word used is "indebted." In the absence of any statutable interpretation of that word, or of the corresponding substantive, "debt," we must adopt the significations that attach to those words from the fact that "debt" is a term of art. In common parlance the word "debt" imports a sum of money due from one person to another; but the legal sense of the word "debt" is the action that lies when a man owes another a certain sum of money, either by a debt of record, by specialty or by simple contract, in short, upon every contract in deed or in law. (*a*) If then any person be in the legal sense of the term "indebted" to another, "by force of any judgment obtained, or of any order for the payment thereof, or of any costs in any court," he must be so, because the judgment or order is one on which an action of debt will lie. If this be so, the powers conferred by the section under consideration can only be exercised when the judgment or order can be enforced by an action of debt.

The action of debt lies upon the judgment of a superior or inferior court of record, (*b*) either generally or against an executor or administrator, suggesting a devastavit. (*c*) It is settled that the action lies on the judgment of an inferior court not of record. (*d*) Although the judgment was erroneous, debt lies until it has been reversed. (*e*) Where the defendant has been charged in execution on the judgment, no action can be supported on it, although he was discharged out of custody upon a promise to pay the sum recovered by instalments, and which he neglects to do. (*f*) So where the defendant has been discharged out of custody under the Lords Act, 32 Geo. 2, c. 28, s. 20, debt is not sustainable.

Neither *assumpsit* nor debt can be sustained on a decree of the court of Chancery for a specific sum of money

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(*a*) Com. Dig. debt A. 1; *Underhill* v. *Ellicombe*, 1 M'Clel & Y. 457. *Speake* v. *Richards*. Hob. 206.

(*b*) Gilb. Debt, 391, 392; Com. Dig. Debt. A. 2; *Anon*. Salk. 209. *Murray* v. *Wilson*, 1 Wils. 316.

(*c*) 1 Saund. 216, 218, 219, *n*. 7, 8; *Woodcock* v. *Morgan*, 6 Mod. 306. *Hope* v. *Bague*, 3 East. 2.

(*d*) *Reed* v. *Pope*, 1 C. M. & R. 302; *Jones* v. *Jones*, 5 M. & W. 523. *Williams* v. *Jones*, 14 L. J. ex. 145.

(*e*) *Horsey* v. *Daniel*, 2 Lev. 161. *Prince* v. *Nicholson*, 5 Taun. 667.

(*f*) *Vigers* v. *Aldrich*, 4 Burr. 2482. *Tayler* v. *Wat*, 5 M. & S. 103.

founded on equitable considerations only,(*a*) or on a mere interlocutory order of a court of law.(*b*) This position is so important, that the leading authorities on which it is based deserve to be specially set forth. In the case of *Emerson* v. *Lashley*, an order for the payment of the costs of a rule to show cause was made by the Lord Mayor's Court in *London*: it was disobeyed; and the person to whom it was ordered that the costs should be paid, brought an action for the recovery of them, as the person who was called on by the order to pay them resided out of the jurisdiction of the Lord Mayor's Court and therefore could not be attached. A verdict was found for the plaintiff, subject to the opinion of the court on the question whether the action could be maintained. The point was argued by most eminent lawyers, and *Eyre*, C. J. gave his judgment in these words: "If there were nothing else in this case but the mere circumstance of its being an action brought for the first time, the court would think again and again, before they would give it encouragement.(*c*) In general, there is another remedy, (however that remedy may fail in an inferior court, where jurisdiction is local,) and the consequence of our determining that an action would lie for such costs as these would be, that instead of applications to the court for their superior interference, numberless actions would be brought, of which we have enough already. And upon general principles of law, it seems pretty clear that no action can lie for such costs. In actions brought in superior courts, the costs become a duty only by being united with the debt in the judgment; there is that sort of credit given to the judgment of a court of competent jurisdiction, that it creates debts and duties, upon which actions of debt are founded. General policy and convenience require that faith should be given to these judgments, and that duties should arise; but as to the conduct, and all the steps belonging to the conduct of the interlocutory proceedings, they are fit to be regulated by the authority of the court where they arise, but by no means fit to be the foundation of general duties creating moral obligations. It is the power of the court that enforces these kind of orders, and the power of the court will always be regulated by the discretion of the court in causes which come before them. I was very much struck with an observation of my brother *Clayton*, that if we suffer an action to be brought for costs thus ordered to be paid in an inferior court, we must take

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(*a*) *Carpenter* v. *Thornton*, 3 B. & A. 52. *Henley* v. *Soper*, 8 B. & C. 20.

(*b*) *Emerson* v. *Lashley*, 2 H. B. 248. *Fry* v. *Malcolm*, 4 Taun. 705. *Carpenter* v. *Thornton*, 3 B. & A. 52.

(*c*) See the observations of Lord *Abinger*, C. B. in *Russell* v. *Smyth*, post, p. 56.

that order to be final. We give credit indeed to judgments of inferior courts, because there is a regular course, if those judgments are improper, by which they may be corrected; but the case is very different with respect to these interlocutory orders, from which there is no appeal or writ of error. It would be impossible to take one of these interlocutory proceedings as final, and if we were to inquire whether the inferior court had done right, what a new field would be open for investigation? If a superior court were to take into consideration a cause with which they had nothing to do, and to give judgment whether the inferior court had done right in making an interlocutory order, it would be impossible for any such court to go on with its ordinary business. The case that comes the nearest to the support of this action is that of the *The King* v. *Chamberlayne*, 1 T. R. 103, where the court of King's Bench decided that the costs upon a recognizance to prosecute were in the nature of a debt, which an administrator might claim. But the expressions in that case must be understood according to the subject-matter. Properly speaking, those costs were not a debt to any one; for if they were a debt, there was no occasion for a recognizance to enforce the payment of them. The court indeed held that the original right devolved from the original party to the administrator; but if it were not a debt to the original party, it was not a debt to his representative; the recognizance indeed was merely a security, without which the costs could not have been recovered at all. That case, therefore, makes against the argument to which it is applied. Upon the whole, therefore, though there will be a particular inconvenience arising in this case, from the circumstance of the defendant being out of the jurisdiction of the inferior court, it is better to oblige the other party to wait till he can be brought within the jurisdiction, than to produce the mischievous consequences, which would ensue from our determining that the present action could be maintained." It was also said by *Heath*, J.: "The question arises upon an action for costs, given by an interlocutory order, which are not costs given by the statute of *Gloucester*. It is a motion in an inferior court by a party against his own attorney. The court acting upon a power it has over its own ministers, declares the complaint groundless and inflicts a penalty. As, therefore, these costs are a penalty, and not given by the statute of *Gloucester*, I am of opinion that the action will not lie." Judgment was therefore given for the defendant.

In the case of *Carpenter* v. *Thornton*, (*a*) it was held that an action at law was not maintainable upon a decree

(*a*) 3 B. & A. 52.

of a court of equity for a specific sum of money founded on equitable considerations only, and therefore, where a bill was filed for the specific performance of an agreement for the purchase of an estate, and the decree was for payment of interest on the purchase money and costs, it was held, that no action of law was maintainable to recover such interest and costs. In that case *Holroyd*, J. explained the principles on which a debt is by law implied from a judgment, in these terms: "The decree does not affect to decide what was actually due, in point of law, on the balance of an account, but it merely directs what is to be paid on an equitable consideration. It is said, however, that the law will, in such a case, imply a promise to pay. In the case of judgments of inferior courts, and courts not of record, where the law implies a promise to pay, it is to pay a legal debt. Wherever there is a debt at law, the court will presume that the party promises to do that which the law requires. When the debt is founded upon equitable considerations alone, it may be enforced by the authority of the court which ordered it to be paid. The law in such a case does not imply a promise. There is no instance of an action brought on a rule of court for payment of money. The mode of enforcing such order is by attachment for contempt in not obeying the order of court. Now, although that does not absolutely show that such an action is not maintainable, yet, where no such action has ever been maintained, it lies on the party bringing such action to state a clear principle on which it is maintainable. In references at *nisi prius*, which are afterwards made rules of court, a verdict is usually taken to secure the payment of the money which may be awarded; unless that be done the award is invariably enforced by attachment. In *Tremenhere* v. *Tressilian*, 1 Sid. 452, it is said that upon such a rule an action might be maintained. In such cases, however, the rule is made with the consent of the parties; and when they consent to the rule, they consent to the submission, and the breach of that submission is the foundation of an action. Although the parties, by entering into the rule, may have subjected themselves to the further obligation of obeying the order of court, the neglect of which may be punished by attachment, yet the breach of the submission is the ground of the action. Admitting, however, that an action might be maintained on a rule of court made with the consent of the parties, it by no means follows that an action will lie upon a rule of court obtained *in invitum*. Such an order does not constitute a legal debt, which alone the law will imply a promise to pay. This decree of the court of equity does not, therefore, constitute such a debt. It must, therefore, be enforced by the court which made it,

and is not the subject of an action at law." The case of *Fry* v. *Malcolm*, (*a*) shows that the doctrine laid down in *Emerson* v. *Lashley* has been deemed applicable to the orders of the superior courts of law. The doctrine has received a more recent exposition from the court of Exchequer in the case of *Russell* v. *Smyth*. (*b*) It was there held that an action of *assumpsit* or debt might be maintained against a defendant resident in this country, for costs awarded against him, after appearance, by a decreet of the court of session in *Scotland*, in a suit for a divorce; but it was established by evidence that the decreet was in fact a judgment by default. Lord *Abinger*, C. B., distinctly stated that the case was governed by the principles that were laid down in *Emerson* v. *Lashley;* that the decreet was a judgment; and, being a judgment, even if it were that no action for costs had ever been brought on a foreign judgment, he "should be disposed to set an example of such an action." The conclusion, therefore, is, that an order for the payment "of any costs in any court," unless it amount in law to a judgment, will not constitute such a debt as will render the person who is required to obey it "indebted" within the meaning of the section now under consideration. The same reasoning applies with increased force to any mere "order," not purporting to be an order for costs, and not being a judgment of a court, if any such order should arise in practice.

It will perhaps be contended that the provisions of the 1 & 2 Vict. c. 110 militate against this view: it is apprehended, however, that such is not the case. The 18th section of that statute indeed enacts that "all decrees and orders of courts of equity, and all rules of courts of common law . . . . whereby any sum of money, or any costs, charges, or expenses shall be payable to any person, shall have the effect of judgments in the superior courts of common law." Moreover the 22nd section of that Act provides that the judgments, rules or orders for the payment of money of any inferior court of record in which "at the time of passing this Act a barrister of not less than seven years standing shall act as judge, assessor, or assistant in the trial of causes," may by certain proceedings therein described be removed into a superior court, and when so removed shall have the same force, charge, and effect as a judgment recovered in or a rule or order made by such superior court. But, in the first place, the 18th section enacts, that "the persons to whom any such monies, or costs or charges or expenses shall be payable, shall be deemed judgment creditors *within the meaning of this Act;* . . . . And all remedies *hereby* given to judgment creditors are

(*a*) 4 Taun. 705. (*b*) 9 M. & W. 810.

in like manner given to persons to whom any monies, or costs, charges or expenses, are by such orders or rules respectively directed to be paid." It is quite clear that the intention of the legislature, when it used the phrase "shall have the effect of judgments in the superior courts of common law," is explained by the passages last quoted. The meaning of "effect of a judgment" is apparent from previous sections. To the 11th section there is a preamble in these words: "And whereas the existing law is defective in not providing adequate means for enabling judgment creditors to obtain satisfaction from the property of their debtors, and it is expedient to give judgment creditors more effectual remedies against the real and personal estate of their debtors than they possess under the existing law." Then in that and the succeeding sections, up to section 17 inclusively, follows a series of enactments for seizing in execution all the lands of the debtors, for seizing money and securities for money, for charging real estate and stock, and making judgments carry interest. By these sections the "effect" of a judgment within the meaning of the Act is made plain. There is not any thing to extend the meaning of the phrase "effect of judgments" beyond the meaning of the phrase "remedies hereby given;" and it would be inconsistent so to extend it, because the persons entitled to enjoy an "effect of judgments" so extended would not be judgment creditors within the meaning of that Act only, but would be judgment creditors absolutely.

The case of an order for payment of costs, made by an inferior court, and amounting in fact to a judgment, will be of constant occurrence. It is in fact the case of a judgment of nonsuit; and in the case of *Murray* v. *Wilson*, (*a*) in which the principles on which the duty of paying costs rests were most ably and lucidly expounded by the counsel for the plaintiff, it was held that debt lay upon a judgment of nonsuit in an inferior court.

"*Which judgment or order shall have been obtained from any court of competent jurisdiction in* England."

It is quite clear on principle, and countless authorities could be cited to show, that a judgment or order which has been given or made by a court not of competent jurisdiction, is in fact a mere figment. The special direction of an Act of parliament therefore was not necessary to prevent effect from being given to a judgment or order obtained from a court of incompetent jurisdiction. Neither was the introduction of the words "court of competent jurisdiction" necessary, in

(*a*) 1 Wils. 316.

order that the exercise of the power conferred in a subsequent part of the statute should be restricted to judgments or orders obtained from courts in *England*. On the other hand, these words must not be treated as surplusage if a meaning can be assigned to them reasonable in itself, and consistent as well with the general intent of the statute as with its particular provisions. Now in the case of *Ferguson* v. *Mahon*, (*a*) which was debt on an Irish judgment, the defendant pleaded that he was never arrested, nor served, nor had at any time notice of any process at the suit of the plaintiff for the cause of action upon which the judgment was recovered, and that he had never appeared thereto. To this plea there was a replication so bad, that on demurrer the question really turned upon the goodness of the plea. It was argued that, if the judgment was in fact open to the objection urged in the plea, it was irregular only, and might have been set aside upon application to the court in which it was recovered, and that it must be respected as a valid judgment, so long as it stood unreversed But in giving judgment Lord *Denman*, C. J., said: "This argument puts an Irish judgment, in this respect, on the same footing precisely as a judgment recovered in one of the superior courts of this country; but, although a record for certain purposes, the inquiry is still open, not indeed into the merits of the action or the propriety of the decision, but whether the judgment passed under such circumstances as to show that the court had properly jurisdiction over the party: and when it appears, as here, that the defendant has never had notice of the proceeding, or been before the court, it is impossible for us to allow the judgment to be made the fonndation of an action in this country." Thus it appears that in the superior courts, the inquiry will be entertained, not only whether the court, judgment of which is made the foundation of an action, had jurisdiction generally over the cause of action, but also "whether the judgment passed under such circumstances as to show that the court had properly jurisdiction over the party." Now the competency of a court to decide on a cause of action depends on the authority and jurisdiction that belong to it from its very constitution; the competency of a court to give judgment against a party depends first, on its competency to entertain the cause of action, and secondly, on the legality of the process by which the party to the cause is brought before the court. A court may be of competent jurisdiction to entertain a cause, and yet not have jurisdiction to pronounce judgment against the party because process has been omitted or has miscarried. Again, process against the parties may have been regular and complete, and yet the court may not be of competent jurisdic-

(*a*) 1 Ad. & E. 179.

tion because not properly constituted. The language of Lord *Denman*, C. J., in the case of *Ferguson* v. *Mahon*, suggests a distinction which the foregoing considerations support. He said that the inquiry was open "whether the judgment passed under such circumstances as to show that the court had properly no jurisdiction over the party." It could not have been contended for a moment in that case that the court which had pronounced the judgment was not of competent jurisdiction. The court of Queen's Bench therefore decided in favour of the defendant, on the ground that he was entitled to show that the court in *Ireland*, though of competent jurisdiction, had not in fact had jurisdiction over the particular case. It is submitted that this distinction explains the reason why the words "of competent jurisdiction," apparently mere surplusage, have been introduced into this part of the section. The court whose assistance is sought for enforcing a judgment, may inquire whether the court that pronounced the judgment was one of competent jurisdiction to pronounce such a judgment; but it shall not inquire whether the judgment passed under such circumstances as to show that the court had properly jurisdiction over the party. This is analogous to the practice in cases of prohibition. (*a*) Cases may be supposed in which the court that has pronounced the judgment, being an inferior court, has acted according to a course in violation of the common law: it is apprehended, however, that not under such circumstances even should the court whose assistance is sought under this statute inquire into anything beyond the competency of the jurisdiction, for obviously it could not determine whether or not there had been an alleged consent.

The judgment or order must have been obtained from a court of competent jurisdiction in *England*. This restriction is confirmed by the 25th section, which enacts, "that this Act shall apply only to *England*."

"*It shall be lawful for the creditor so having obtained a judgment or order.*"

It has been observed that a court, in order that it may be one of competent jurisdiction, must not only have jurisdiction over the cause of action, but must when exercising that jurisdiction be properly constituted. Now the clausules that have been considered show the conditions precedent of all the other proceedings under the section. In order, therefore, to entitle a creditor to the benefit of the remedies given by the section, he must have "obtained" from a court of competent jurisdiction in *England*, a judgment or order that

(*a*) *Ante*, p. 66. *Ricketts* v. *Bodenham*, 4 A. & E. 433.

will *primâ facie* support an action of debt. To set in motion the court on which he calls for assistance, in enforcing such judgment or order, he must produce evidence that he has obtained it. That evidence must, on the face of it, show competency of jurisdiction, that is, it must show a judgment pronounced by a court properly constituted on a subject-matter over which that court has jurisdiction. As, however, the production of such evidence is not the first step in the process of obtaining the remedy, it will be more convenient to discuss the nature of it hereafter.

It has already been shown, that the word "creditor" means "judgment creditor."

"*To obtain a summons from any commissioner of the court of Bankruptcy, for the district in which such debtor shall reside or be, or from any court of requests or conscience, or inferior court of record for the recovery of debts, or other court for the recovery of small debts, within the jurisdiction of which such debtor shall reside or be, having a judge who shall be either a barrister-at-law, special pleader, or an attorney of not less than ten years' standing of one of Her Majesty's superior courts of common law at* Westminster, *which summons such commissioner of the court of Bankruptcy, or such court, shall be authorized and required to grant according to the form in schedule* (*A*) *hereunto annexed, upon the application of such creditor by any petition or note in writing according to the form in schedule* (*B*) *hereunto annexed.*"

That the creditor has obtained a summons, will hereafter be shown to be a most important constituent of the jurisdiction to apply the remedies. The circumstances under which it will be lawful for the creditor to obtain the summons have already been indicated: the evidence requisite to establish the fact that such circumstances have taken place, will be determined hereafter. The mode of obtaining it will be by an application, for which the following form is given by the Act.

SCHEDULE (B.)

Be pleased to summon *C. D.* of ——— to answer touching the debts due to me by the judgment [*or* order] of the court of [*set forth the style or sufficient description of the court which gave the judgment or made the order*] on my behalf.

(Signed) [*Party's name*] *of* ———.

Considering how eminently technical is our system of law, it is difficult to conceive why rigid adherence to the style of the court which has given the judgment is not required. A snare is laid for the unskilful, by giving them the option of inserting any other "sufficient" description of the court.

It is to be hoped that each court will cause forms of application for summons to be prepared, which, while they shall be "according to the form in schedule (B)," shall also be in a form that will better subserve the purposes of the Act. It is not said that the summons shall not be in any other form, and therefore a form containing the statements of that in schedule (B), would not be vitiated by the introduction of words more particular and significant. Undoubtedly the form in schedule (B) would be sufficient; but as in most cases the applicant, or some one on his behalf, would attend to pay the fees, and ascertain the day fixed for hearing, it would be possible to obtain an application from him in the subjoined form:—

——— the ——— day of ———.

To [*style of court from which the summons is to be issued.*]

Be pleased to summon ——— of ———, to answer touching the debts due to me by the judgment [*or* order] of the court [*style of court which gave the judgment or made the order, as it appears on the judgment or order*] on my behalf, bearing date the ——— day of ———.

(Signed) [*Party's name.*]

The summons is to be issued in the form given in schedule (A). That form is as follows:—

You are hereby required to appear before [*set forth the court's style*] at ———, on the ——— day of ——— next, to answer such questions as may be put to you touching the not having paid to *A. B.* of ——— the sum of £ ———, recovered in a certain judgment [*or* order] of [*set forth the style or other sufficient description of the court that gave the judgment or made the order.*]

To C. D. of ———.

By order of the court,

(Signed) ———.

The form of the summons, though less defective than that of the application, is nevertheless insufficient. It is clear that the summons must have a date. Then, as has been suggested in respect of the application, the date of the judgment or order should be given. The creditor ought to be called on to produce proper evidence of the judgment or order before the summons is issued, and the style of the court adopted in the judgment or order should be strictly adhered to, for the most jealous care should be had that the question of what is a sufficient description of the court by which a judgment has been given or an order made be not raised by an objection to the regularity of the summons. If, indeed, the 7 & 8 Vict. c. 96, had not been so incorporated with the

Act under consideration, as to make the direction to interpret "in the most beneficial manner for promoting the ends intended" by the Act, applicable to both statutes, it might fairly be doubted whether a summons setting forth with accuracy the style of the court by which an order had been made would suffice. For, first, that such a court is of competent jurisdiction is a condition precedent to the right to obtain the summons, and it might be contended, on principle, that the competency of the court to entertain the subject-matter ought necessarily to appear; and, secondly, it might be further contended that the direction in the schedules, "other sufficient description of the court," was meant to apply when the style of the court did not show the jurisdiction, so that the prescribed mode of filling up the blank would be, by inserting the style of the court if sufficient, and, if the style of the court was insufficient, by inserting some other description having the requisite sufficiency. The ends intended by the Act, however, will be best promoted by holding that the style of the court shall be sufficient, and no real detriment will accrue to the party summoned, as he will still have the opportunity of examining the judgment or order, and seeing whether competent jurisdiction appears on its face.

The following form of summons is recommended:—

——— the ——— day of ———.

You are hereby required to appear before [*set forth the court's style*] at ——— on the ——— day of ——— next, to answer such questions as may be put to you touching the not having paid to ——— of ———, the sum of money recovered in a certain judgment [*or* order] of [*style of court by which the judgment was given or the order made*] bearing date the ——— day of ———.

To C. D. of ———.

By order of the court,
(Signed) ———.

"*From any commissioner of the court of Bankruptcy for the district in which such debtor shall reside or be.*"

The words used being "any commissioner," the application may be addressed to any one of the commissioners who act for the district in which the debtor shall reside or be, that is, in which the debtor shall have his residence or shall actually be at the time of the application. But it is apprehended that the debtor must also either reside or actually be within the district within which the commissioner is authorized to act, at the time the summons is served. It cannot have been intended that mere transit through a

district should give jurisdiction; on the other hand, something less than permanent residence is contemplated: the mean, perhaps, would be such an abiding as admits of application for a summons and service thereof; or a similar frequenting, as, for instance, the seeking a livelihood in a place, as contradistinguished from residence in it.

The question will also arise, what is the meaning of the word "reside." The cases in which the courts have been called in to determine the meaning of that word have been cases relating to settlements, for the gaining which in many cases residence is necessary. The residence has always been determined by the parish in which the party slept, and had his place of rest, and not by the parish where the more active portion of his time has been spent. (*a*) The *animus commorandi*, or *revertendi*, is of course necessary, and of this some evidence must be given, when the party does not appear, and the word "be" does not come in aid. The nature of this evidence must depend on the circumstances of each case. The forty days of the statute of Car. 2 would throw but little light on the subject in the present state of society.

The creation of districts for the purpose of the administration of the bankrupt laws was effected by an order in council, authorized by section 59 of the 5 & 6 Vict. c. 122, which empowered Her Majesty to appoint as many as twelve persons "to be commissioners of the said court of Bankruptcy, in addition to the present commissioners of the said court, to act in the prosecution of fiats of bankruptcy in the country," and that "any one or more of such additional commissioners shall and may form a district court of bankruptcy for the purposes of this Act, and that every such court shall be authorized to act in the prosecution of fiats in bankruptcy in the country, at such place and in and for such district as Her Majesty, with the advice of her privy council, shall be pleased to direct; and that it shall be lawful for Her Majesty, with the advice aforesaid, to describe, and from time to time to alter, the limit and extent of every such district as to Her Majesty shall seem fit: provided always, that nothing herein contained shall prevent the lord chancellor, when he shall deem it expedient, from directing any fiat in bankruptcy to the court of Bankruptcy." It is quite clear from this section that the word "district" means country district, and that the large portion of *England* not included in any one of the districts is not in law a district within the meaning of the 5 & 6 Vict. c. 122. If such were the interpretation to be put on the word "district" in the section under consideration, it would be impossible to procure the aid of the court

(*a*) *Feversham* v. *Gravenny*, Fort. 221.

of Bankruptcy against debtors not residing nor being within one of the districts defined by the order of council already alluded to. But the 22nd section of the Act before us comes in aid, and authorizes an interpretation in conformity with the 73rd section of the 7 & 8 Vict. c. 96, that is, one that shall be most beneficial for promoting the ends intended by the "said recited Act and this Act." The said recited Act is the 5 & 6 Vict. c. 116. Now the 1st section of the Act last named enables an insolvent debtor to "present a petition for protection from process to the court of Bankruptcy, if he has resided twelve calendar months in *London* or within the *London* district, or to the commissioners of bankrupt in the country within whose district he may have resided twelve calendar months." Here then is the legislative acknowledgment of a *London* district, for which the commissioners of the court of Bankruptcy are commissioners. That district, as before has been observed, includes those portions of *England* not comprised within the limits of a country district.

Districts.

By an order in council dated 2nd Nov. 1842, it is ordered and directed, that for the purpose of the said recited Act, there shall be seven districts in the country, and that such several districts shall be called respectively by the names following: that is to say,—

The Manchester District.
The Leeds District.
The Liverpool District.
The Birmingham District.
The Bristol District.
The Exeter District, and
The Newcastle-upon-Tyne District.

And it is hereby further ordered and directed, that district courts of bankruptcy shall be authorized to act in the prosecutions of fiats in bankruptcy in the country, in and for such several districts, at the several places hereinafter in that behalf mentioned: that is to say,—

In and for the Manchester District—at *Manchester*.
In and for the Leeds District—at *Leeds*.
In and for the Liverpool District—at *Liverpool*.
In and for the Birmingham District—at *Birmingham*.
In and for the Bristol District—at *Bristol*.
In and for the Exeter District—at *Exeter*.
In and for the Newcastle-upon-Tyne District—at *Newcastle-upon-Tyne*.

And it is hereby further ordered and directed, that the limit and extent of such said several districts, for the purpose

of the said recited Act, shall be as hereinafter described, that is to say,

Manchester District.]—The Manchester District shall comprehend all places included within, or to be considered as forming parts of, the northern division of the county of *Chester*, as the same is settled and described by a statute made at the Parliament holden in the second and third years of the reign of his late Majesty King *William* the Fourth, intituled "*An Act to settle and describe the Divisions of Counties, and the Limits of Cities and Boroughs in* England *and* Wales, *in so far as respects the Election of Members to serve in Parliament;*" and all places included within, or to be considered as forming parts of, the northern division of the county of *Derby*, as the same is settled and described by the said last-mentioned Act; and the following places in the county of *Lancaster*, that is to say,—*Blackburn*, *Clitheroe*, *Lancaster*, *Preston*, *Ashton-under-Lyne*, *Bolton-le-Moors*, *Bury*, *Manchester*, *Oldham*, *Rochdale*, *Salford*, *Warrington*, and *Wigan;* and also all other places locally situated in the said county of *Lancaster*, and which are on the eastern side of any of the several railways hereinafter mentioned, and commonly understood by the following names: that is to say,—

The Grand Junction Railway.

The North Union Railway, and

The Lancaster and Preston Junction Railway; or which are northward, eastward, or westward of *Lancaster* aforesaid, or westward or northward of the river *Lune*.

And it is hereby further ordered and directed, that the several places in the said county of *Lancaster* hereinbefore expressly named, shall include the place or places respectively which are comprehended within the boundaries of every such place, as such boundaries are settled and described by the said last-mentioned Act.

Leeds District.]—The Leeds district shall comprehend all places locally situated in the county of *York;* and all places included within, or to be considered as forming parts of, the northern division of the county of *Nottingham*, as the same is settled and described by the said last-mentioned Act; and all places locally situated in the parts of *Lindsey* in the county of *Lincoln*.

Liverpool District.]—The Liverpool District shall comprehend all places included within, or to be considered as forming parts of, the southern division of the county of *Chester*, as the same is settled and described by the said last-mentioned Act; and all such places locally situated in the county of *Lancaster* as will not be included in the

Manchester district hereinbefore described; and all places locally situated in any of the several counties in *Wales* hereinafter next mentioned, that is to say—the county of *Anglesea*, the county of *Carnarvon*, the county of *Denbigh*, the county of *Flint*, the county of *Merioneth*, and the county of *Montgomery*.

Birmingham District.]—The Birmingham District shall comprehend all places locally situated in any of the several counties hereinafter next mentioned, that is to say,—the county of *Warwick*, the county of *Worcester*, the county of *Hereford*, the county of *Salop*, the county of *Stafford*, and the county of *Leicester*, and all places locally situated in the parts of *Kesteven* and *Holland*, in the county of *Lincoln*; and all places included within, or to be considered as forming parts of, the southern division of the county of *Nottingham*, as the same is settled and described by the said last-mentioned Act; and the town and county of the town of *Nottingham*; and all places included within, or to be considered as forming parts of, the southern division of the county of *Derby*, as the same is settled and described by the same Act.

Bristol District.]—The Bristol District shall comprehend all places locally situated in the county of *Gloucester*; and all places locally situated in the county of *Monmouth*; and all places included within, or to be considered as forming parts of, the northern division of the county of *Wilts*, as the same is settled and described by the said last-mentioned Act; and all places included within, or to be considered as forming parts of, the eastern division of the county of *Somerset*, as the same is settled and described by the same Act; and the county of the city of *Bristol*, and all places within the limits of the city of *Bristol*, as the same are described in the said last-mentioned Act; and all places locally situated in any of the several counties in *Wales* hereinafter next mentioned, that is to say,—the county of *Brecon*, the county of *Cardigan*, the county of *Carmarthen*, the county of *Glamorgan*, the county of *Pembroke*, and the county of *Radnor*.

Exeter District.]—The Exeter District shall comprehend all places locally situated in the county of *Devon*; and all places locally situated in the county of *Cornwall*; and all places included within, or to be considered as forming parts of, the western division of the county of *Somerset*, as the same is settled and described by the said last-mentioned Act; and all places locally situated in the county of *Dorset*, excepting the several places in the same county hereinafter

next mentioned, that is to say,—*Poole*, *Wimborn Minster*, *Blandford*, *Sturminster*, and *Shaftesbury*; and excepting also all other places locally situated in the said county of *Dorset*, which are situated within the distance of one hundred miles from the General Post-office, in the city of *London*; and the several places hereinbefore and hereinafter next mentioned, that is to say,—*Poole* and *Shaftesbury*, shall include the place or places respectively which are comprehended within the boundaries of each such place, as such boundaries are settled and described by the said last-mentioned Act.

Newcastle-upon-Tyne District.]—And the Newcastle-upon-Tyne District shall comprehend all places locally situated in any of the several counties hereinafter mentioned, that is to say,—the county of *Northumberland*, the county of *Durham*, the county of *Cumberland*, and the county of *Westmorland*; and also the town of *Berwick-upon-Tweed*.

Provided always, that it is hereby further ordered and directed, that if any part of any county hereinbefore mentioned, which is detached from the main body of such county, but for which no sufficient provision is hereinbefore made, shall be surrounded by two or more counties, or divisions, or ridings, or parts, then every such detached part shall be considered as forming part of that county or division, riding or parts, with which such detached part shall have the longest common boundary.

"*From any court of requests or conscience, or inferior court of record for the recovery of debts, or other court for the recovery of small debts.*

The application is to be made to the "court," not to the judge.

Courts of requests or conscience may be defined to be courts created by Act of Parliament, the judgments of which are by the express words of the statute to be regulated by "equity and good conscience," instead of by the common law." The courts of *Westminster* are the superior courts.

An inferior court of record for the recovery of debts is a court of justice which has power to hold plea according to the course of the common law, of personal actions whereof the debt or damage amounts to 40*s.* or above. Such courts are created by Parliament, letters patent, or prescription. (*a*)

(*a*) 1 Inst. 160.

Courts for the recovery of small debts, in contradistinction to the other two classes of courts, are those the jurisdiction of which is limited to debts under 40*s*.

"*Within the jurisdiction of which such debtor shall reside or be.*"

The meaning of the words "reside" and "be" has already been discussed. To give jurisdiction the debtor must "reside" or "be" within the jurisdiction of the court to which he applies for assistance. Nothing is so derogatory from the dignity, and therefore from the usefulness of a court, as that its authority should be treated with disrespect and be exposed to ostentatious defiance. Such will be the consequence of issuing a summons to a person who cannot be shown to "reside" or "be" within the jurisdiction.

"*Having a judge who shall either be a barrister-at-law, special pleader, or an attorney of not less than ten years' standing of one of Her Majesty's superior courts of common law at* Westminster."

The word "having" must be understood to mean "which shall have at the time of the application," and must not be restricted to the sense of "having at the time the Act passes." Were the latter signification intended, the word would be "has." If the matter were at all doubtful, the direction in the 73rd section of the 7 & 8 Vict. c. 96, so often alluded to, would come in aid. The intention of the Act is, obviously, to multiply the courts that shall have the power to enforce the debt, so that the debtor may be taken to the least possible distance from his home.

To have jurisdiction the court must have a judge, who is a barrister-at-law; or a special pleader, one, that is, who has taken out his certificate as such; or, an attorney of not less than ten years' standing of one of the superior courts of common law at *Westminster*. It is remarkable that the enumeration of the qualifications that shall enable a judge who is in office to exercise the jurisdiction, differs from the qualifications which are necessary to render a legal practitioner eligible for the office of judge under the powers to appoint conferred on commissioners by the 7 & 8 Vict. c. 96, s. 72. Under that section, which still governs appointments to be made by commissioners of courts of requests, a special pleader is not eligible, while an attorney of the court of Common Pleas at *Lancaster* is; a barrister is not eligible unless he shall have practised as such for at least seven years then last past; and an attorney, whether of

the courts of *Westminster*, or of the court of Common Pleas at *Lancaster*, is only eligible, if he has practised for at least ten years.

> "*Which summons such commissioner of the court of bankruptcy, or such court, shall be authorized and required to grant, according to the form in schedule* (*A*) *hereunto annexed, upon the application of such creditor by any petition or note in writing according to the form in schedule* (*B*) *hereunto annexed.*"

It may not be improper to repeat the observation that it is the "court," not the "judge," which is to grant the summons. The granting the summons will be imperative when the creditor shall have applied by any petition or note in writing according to the form. As the application of the creditor founds the jurisdiction to issue the summons, that application must be in due form, that is, it must be in writing. The requisites of the form must also be complied with; but, for the reasons above given—to which it may be added, that the Act uses the word "any"—it should seem that a petition or note in writing more ample will not be irregular, and perhaps will be more fit. The application must be made by "such creditor," that is, by the creditor "so having obtained a judgment or order." "Such" creditor, therefore, must be a person to whom the debtor "is or shall be indebted" by force of any judgment or order: that is, he must be a person capable of suing on the judgment, or order in the nature of a judgment—in short, he must be the person having the strict legal title and interest.

In disputing the sufficiency of the application, the defendant may dispute the identity of the applicant with the person entitled to payment under the judgment or order, or, if the applicant be not that person, his title and interest. The truth, however, must be tried summarily; and if the applicant makes such an affirmative statement of his identity, his interest or title, as will subject him to an indictment for perjury if the statement be false, it would seem that his statement must be acted on.

The mere fact that a summons has been granted against a person by an authority competent to grant it, does not give the court jurisdiction unless it have been served. Now, the words used are "obtain" and "grant," and not only does there not seem to be any reason why the summons should not be served by the applicant; but, as due service must be proved, and as the saving of expense is impliedly an object in all acts that purport to make the recovery of debts more easy, there seems to be every reason why the applicant should have the option of himself serving the summons. The schedule of

"Bailiffs and Serjeants Fees" provides payment for the service of the summons, and the thirteenth clause, as will hereafter be seen, empowers the judge, circuitously at least, to make it incumbent on the applicant to pay for the service of the summons. It is submitted, however, that the judge will allow the applicant an option in this respect, and in that case the summons should have a distinct notice that the order may be served by the applicant, and also of the mode in which it should be served.

Whether the applicant will have the choice contended for when the debtor resides in *Westminster* or *Southwark*, will be considered hereafter.

With regard to the manner of service, the following observations of Mr. Lush lay down the rule: (*a*) "There is a settled distinction between rules, orders, demands, &c., the disobedience to which would be a contempt of court, and would therefore subject the party to an attachment, and those which are not intended for any such purpose, both with respect to the person on whom the service is made, and the mode of service. The former must be served and made on the party himself, whether he be the attorney, agent, or the client; (*b*) and the service must be in the strictest sense general—that is, the document must be brought directly to the notice of the party, a copy must be left with him, and, whether he requires it or not, the original must be shown. At one time the courts were disposed to relax this rule, and to allow what may be termed a constructive service, particularly where the party was an attorney; (*c*) but it seems now to be settled that nothing short of personal service will suffice, even though the party keeps out of the way on purpose to avoid it, (*d*) particularly if the other has an alternative remedy.(*e*). . . . . In the cases above treated of, every document, forming a material ingredient in the proceeding, whether it be a rule *allocatur* or notice, must be served in the same way as if it were a rule *nisi* for an attachment."(*f*) Now, the language of the section shows plainly that a summons granted under it is in fact a rule *nisi* for an attachment. The question therefore arises, what amounts to *personal* service? In the case of *R.* v *Koops*, (*g*) the person endeavouring to serve the defendant went to his house and knocked at the door; the defendant came to it; the deponent then showed him the original rule and *allocatur* indorsed, and demanded the amount of costs claimed on the

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(*a*) *Lush's Practice*, 752.

(*b*) *Garland* v. *Goulden*, 1 Y. & J. 89. *Wollison* v. *Hodgson*, 3 D. P. C. 171.

(*c*) *Green* v. *Prosser*, 2 D. P. C. 99. *Allier v. Newton*, 2 D.P.C. 582.

(*d*) *Sternell* v. *Tower*, 2 D. P. C. 673. *Albin* v. *Toomer*, 3 D. P. C. 563. *Richmond* v. *Parkinson*, 3 D. P. C. 703.

(*e*) Re *Lowe*, 4 B. & Ad. 412.

(*f*) *Birkett* v. *Holme*, 4 D. P. C. 556.

(*g*) 3 D. P. C. 566.

allocatur. The defendant then shut the door in the deponent's face, declaring that he would not be served. The deponent then pushed a copy of the rule and *allocatur* under the door and came away. *Williams*, J., held that these facts entitled the prosecutor to the rule for an attachment. In the case of *Bottomley* v. *Belchambers* (*a*) it was held by *Coleridge*, J., that if facts be stated in support of an application for an attachment, from which it may be presumed that the person sought to be served has received notice of the contents of the rule and *allocatur* and of the demand thereon, and on showing cause against the rule such knowledge is not denied, the court ought to direct that the attachment issue. In the case of *R.* v. *Dignam*, (*b*) *Gurney*, B., held that when the rule and demand had come to the knowledge of the party sought to be served, sufficient foundation was laid for an attachment. In the case of *Dicas* v. *Warne*, (*c*) *Tindal* C. J., adopted the rule laid down by Mr. Archbold. (*d*) "The rule as now understood, and more especially since the late rule of all the courts of Hilary Term, 2 W. 4, s. 51, seems to be that personal service will not be dispensed with, unless indeed it appears that the rule has been seen in the actual possession of the party who should have been served with it, or under some very strong facts." His lordship added: "Perhaps an acknowledgement by the party that it has come to his hands would suffice; but in all other cases, it seems personal service cannot be dispensed with." This doctrine, it is submitted, should be followed in the proceedings under consideration, as the party has not an alternative remedy.

It may happen that the party appears, and complains that he has not been duly served. The question then will arise whether, as the object of the summons was to bring the party into court, the fact of his appearance is not an answer to the objection. In the case of *Levy* v. *Duncombe*, (*e*) Lord *Abinger*, C. B. remarked under such circumstances: "The rule *nisi* is served merely for the purpose of bringing the party here; if he appears, as he does here by his counsel, that obviates the necessity of inquiring whether the service of the rule *nisi* was personal or not; though, if no one had appeared, the court would probably not have made the rule absolute for an attachment, except on affidavit of personal service." Of the same opinion were the other judges. On the other hand there have been cases in which the court has been of opinion that such an appearance ought not to operate as a waiver, inasmuch as it only amounted to a protest, and, if the party were not to appear and protest, he would be compelled to

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(*a*) 4 D. P. C. 26.
(*b*) 4 D. P. C. 359.
(*c*) 1 Scott, 537.
(*d*) *Archbold's Practice*, 3rd ed. 984.
(*f*) 3 D. P. C. 441.

submit to the irregularity.(*a*) It is difficult not to see that if a person who appears to complain of an irregularity in service is held to waive the irregularity, there will not be any complaint of irregular service, and, as a consequence, there will, if the tribunal be one of the superior courts, be acquiescence, which will lead to the irregularity becoming habitual; or, in the case of inferior courts, there will be applications for writs of prohibition or of *habeas corpus*, and, when the latter have been granted, some very disagreeable actions. The proper subject of inquiry in such a case would seem to be, whether the irregularity was such that the fact of the summons having come to the knowledge of the party summoned cured it. The test would be the intention of the court in respect of time, and the other elements of a notice. If the summons has come to the knowledge of the person summoned sufficiently early to admit of that interval elapsing between the time of service and the time fixed for appearing which the court has considered necessary,(*b*) and if the summons convey all the information which the court designed should be given, then the irregularity should be held to be cured because in fact it has been cured. This principle, it is believed, will reconcile all the cases. In applying it, it must be borne in mind that a rule *nisi* cannot be served on a *Sunday*. (*c*)

"And the debtor appearing before such commissioner or court at the time to be appointed in such summons."

When the debtor appears the formal proceedings that give jurisdiction must be gone through unless the debtor waive them. First, service of the summons must be proved, and on oath or affirmation. The difficulty suggested by the omission to give the judge acting under the 59th section of the 7 & 8 Vict. c. 96, the power to administer an oath will not arise, as it is the "court" that will have the power to examine. In case of constructive service there will no doubt be frequent applications to open the order. The rule to be observed in such a case has been laid down by the court of Common Pleas in the case of *Hopley* v. *Granger*.(*d*) There an attachment had been obtained against the defendant, upon the usual affidavit of service, for not complying with the prothonotary's allocatur, and a motion was made for opening the rule, upon an affidavit of the defendant stating that he had never been served: but the court said that "on motions for attachment, where service has been sworn to, the court will not set aside the attachment upon the oath of the party himself

(*a*) *Biddulph* v. *Gray*, 5 D. P. C. 405. *Wood* v. *Cruchfield*, 1 D. P. C. 537.
(*b*) *Farrell* v. *Dale*, 2 D. P. C. 15.
(*c*) *Mc Ilham* v. *Smith*, 8 T. R. 68.
(*d*) 1 N. R. 256.

that he has not been served, unless he can also show that some mistake has been made in the service, as that one person has been served for another; and that as process is generally served without a witness, it would lead to the greatest inconvenience if a different rule was to prevail."

The service of the summons being proved, it will be competent to the party summoned to object to its sufficiency, to demand proof of the application in writing, and to object to the sufficiency of it. These topics have been already discussed.

It will next be necessary to prove the judgment or order. It must, as has already been shown, be one that will support an action of debt at the suit of the party applying; it must on its face appear to have been obtained from a court of competent jurisdiction; if it in effect direct the payment of money, as for a debt, the sum so directed to be paid must not exceed 20*l*., and in estimating that sum the amount of costs is not to be considered. If it direct the payment of money as for costs, the sum to be paid must not exceed 20*l*.

Decrees and judgments are either of record or not of record. If of record, they are to be proved either by actual production from the proper repository, (*a*) by an exemplification, (*b*) or by a sworn copy. (*c*) Exemplifications are either under the great seal or under the seal of a particular court. (*d*) It is only of the latter kind that we shall treat. The seals of the King's courts of justice are of public credit, and are part of the constitution of the courts, and are supposed to be known to all; (*e*) and this, whether the court has existed from time beyond memory, or has been recently created by Act of Parliament. (*f*) But the seals of private courts and persons are not receivable in evidence, unless proved to be the seals of the respective courts or persons. (*g*) In general the exemplification of any record under the seal of one of the King's courts of justice is sufficient. (*h*) Office copies of judicial proceedings, that is, copies made by the known officers of the court, seem to be admissible for particular purposes in the same but not in other courts. (*i*) Not only records, but all public documents which cannot be removed from one place to another, may be proved by means of a copy proved on oath to have been examined with the original. This is to be considered as a deviation, for the sake of public convenience, from the general rule that the best evidence must always be produced. (*j*) All judicial proceed-

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(*a*) Starkie on Evidence, i. p. 298.
(*b*) Ib. Bac. Ab. Ev. F.; Str. 162.
(*c*) Starkie on Evidence, i. p. 298.
(*d*) Gil. Ev. 12.
(*e*) Gil. Ev. 17, 20; 10 Co. 93, *a*.
(*f*) Sid. 146; Gil. L. C. 20.
(*g*) 1 Starkie Ev. 224, and note *a*.
(*h*) 10 Co. 93, *a*.
(*i*) Per Lord Mansfield, C. J. in *Denn* v. *Fulford*, Burr. 1177.
(*j*) 1 Stark. Ev. 226.

ings, whether in British or in foreign courts, (*a*) may be proved by means of a sworn copy, although it be not an office copy; (*b*) and whether the court be a court of record (*c*) or otherwise. The proceedings by English bill in chancery are not records, and may themselves be given in evidence, (*d*) or may be proved by means of examined copies. (*e*) The copy must be one of a complete record, for until it become a permanent record it is transferable, and the reason for admitting a copy to be evidence does not apply. (*f*) Consequently a sworn copy of a judgment in paper, although signed by the master, upon which judgment might be taken out, is not admissible. (*g*) And in general, a mere minute book of proceedings, from which the record is subsequently to be made up, is not admissible in evidence. (*h*) The copy should be of the whole record, or of so much at least as concerns the matter in question. (*i*)

It is a general rule that whenever the original is of a public nature, a sworn copy is admissible in evidence; and that, whenever the thing to be proved would require no collateral proof upon its production, it is provable by a copy. (*j*) Although for the sake of public convenience, the copy of a public document is admitted in evidence as an original, a copy of a copy is of no weight whatsoever, since it is one step further removed from the original. (*k*) The copy must be proved by one who swears that he has compared it with the original, (*l*) taken from the proper place of deposit. It is sufficient for this purpose, either that the witness should have read the copy, whilst another read the original, or *vice versa*, (*m*) for it will not be presumed that a person wilfully misread the record. And it is not necessary that the record should have been read by the officer of the court. (*n*) Before a document can be read as a copy of a record, it must be proved that the original either came out of the hands of the officer of the court, or from the proper place of depositing the records of the court of which it purports to be a record, and the contents of the document itself cannot be referred to in support of such proof. (*o*) A copy is never admissible where the original is produced. (*p*) Where a record has

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(*a*) *Appleton* v. *Lord Braybroke*, 2 Stark. C. 6; 6 M. & S. 34.

(*b*) *Denn* v. *Fulford*, Burr. 1177; Hard. 119.

(*c*) B. N. P. 226.

(*d*) Bac. Ab. Ev. 620.

(*e*) Bac. Ab. Ev. F. 623; 3 Mod. 116.

(*f*) Bac. Ab. Ev. F. 610; B. N. P. 228. *Ayrey* v. *Davenport*, 2 N. R. 474.

(*g*) Ib. *R.* v. *Smith*, 8 B. & C. 341.

(*h*) *Godefroy* v. *Jay*, 3 C. & P. 192. *Lee* v. *Muroche*, 4 Esp. C. 177.

(*i*) 3 Inst. 173.

(*j*) Ld. Raym. 154; Str. 126; 3 Salk. 153.

(*k*) Gil. Ev. 9. Stark. Ev. i. 229.

(*l*) Bac. Ab. Ev. F.; Str. 401.; Stark. Ev. 229, note *k*.

(*m*) *Rolfe* v. *Dart*, 2 Tau. 52. *Gyles* v. *Hill*, 1 Campb. 469. *Tyson* v. *Kemp*, 6 C. & P. 72. *Reed* v. *Macquison*, 1 Camp. 469.

(*n*) *Eccles* v. *Hill*, 1 Camp. 469.

(*o*) *Adamthwaite* v. *Synge*, 1 Stark. C. 183. 4 Camp. 372.

(*p*) 10 St. Tr. App. 137.

been lost, a copy may in some instances be read in evidence without proof upon oath that it is a true copy. (*a*) But to warrant such evidence, the document must be according to the rule of civil law, *vetustate temporis aut judiciaria cognitione roborata*. (*b*) Records are complete as soon as they are delivered into court engrossed upon parchment, and become permanent rolls of the court: then, and not before, a copy becomes evidence. (*c*) A verdict is not evidence without producing the judgment, or an examined copy; for perhaps the judgment was arrested or a new trial granted. (*d*) The judgment of a court of record is proved by a copy examined with the judgment entered on the roll; proof by the judgment book of the court is not sufficient, although the record may not have been made up. (*e*)

A judgment of an inferior court, not of record, is usually established by the production of the book containing the minutes of the proceedings of the court from the proper place of deposit, proved to be such by oral testimony. Copies of court rolls, and of proceedings in the ecclesiastical and inferior civil courts, are also evidence, since the originals are public documents. (*f*) And it is said, that as it is not usual for inferior courts to draw up their records in form, but only short notes, copies of those short notes are good evidence. (*g*) If they are not entered in the books they may be proved by the officer of the court, or other person cognizant of the fact. (*h*) The inquiry, it is submitted, ought, for the reasons already assigned, to be confined to the competency of the jurisdiction, and not to the regularity of process.

An objection to the reading a decree or judgment must be made before it is read. (*i*)

That which has been said respecting its being essential that an order or judgment shall, on its face, show that it was made by a court of competent jurisdiction, will not require any exposition, so far as the superior courts of *Westminster* are concerned; for every thing is supposed to be done within the jurisdiction of the superior courts, unless the contrary especially appears. (*j*) On the other hand, nothing shall be intended to be within the jurisdiction of an inferior court, but what is expressly alleged. (*k*) Superior courts are divided into those that are more or less principal. The more principal are the Lords House in Parliament, the Chancery, the Queen's Bench, Common Pleas, and Exchequer. Of the less

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(*a*) Gilb. Ev. 89, pl. 18: Bac. Ab. Ev. F.

(*b*) Dig. 202; 1 Mod. 117.

(*c*) Gilb. Ev. 22. B. N. P. 283.

(*d*) *Pitter* v. *Walker*, 1 Str. 161; B. N. P. 234.

(*e*) 1 Stark. Ev. 299.

(*f*) 12 Vin. Ab. A. b. 26, p. 29.

(*g*) Ib. per *Hale* in *R.* v. *Harris*, Comb. 337. *Fisher* v. *Lane*, 2 Bl. 834. *R.* v. *Smith*, 8 B. & C. 342.

(*h*) *Dyson* v. *Wood*, 3 B. & C. 451.

(*i*) *Layburn* v. *Crisp*, 8 C. & P. 397.

(*j*) Bac. Ab. Court, D. 3.

(*k*) Ib. *Jennings* v. *Hanning*, Carth. 11, 12.

principal it would be outstepping the scope of this work to treat.

Inferior courts are bounded in their original creation to causes arising within such limited jurisdiction; and hence it is necessary for them to set out authority. (*a*) The maxim "*Omnia præsumuntur rite esse acta*" does not apply to give jurisdiction.(*b*) The style of the court must therefore be shown, and that it has power to hold plea or plaint, as by prescription or letters patent from the Crown. In *Halman* v. *Collins*, (*b*) it was so determined on error by the whole court; so also in *Jerratt* v. *Caldwell*, (*c*) *Johnson* v. *Underwood*, (*d*) *Mouse* v. ———, (*e*) *Wilson's Case*. (*f*) Where there is the allegation of authority, the style will in some cases be helped by intendment.(*g*) It must be shown that the cause of action arose within the jurisdiction, but the mere allegation of this will suffice. (*h*) Reasons have already been urged why the proceedings need not be set forth; to these it may be added, that in a plea of justification to trespass, they have for a great length of time been set forth by way of *taliter processum fuit*. (*i*) The extent of the jurisdiction of the court must be shown, so that the subject-matter of the action or plaint appears to fall within it. (*j*) The court must appear to be properly constituted to have jurisdiction over the cause. (*k*) The last two requisites must be required with the utmost jealousy, when the court of which it is sought to enforce the judgment has obtained an extension of jurisdiction under the ninth section of this Act.

The most implicit faith must be given to the allegations and averments in the judgment or order. Indeed, it would be impossible to try them. A superior court would not try the averments in a judgment or order of an inferior court by allowing the defendant to declare in prohibition on them; neither may any court of inferior jurisdiction presume to question, alter, or try the correctness of the averments in a judgment of a superior court. Such a court would not question the correctness of the averments in a judgment of its own, except in a formal proceeding for that purpose. (*l*) In the case of *Mendyke* v. *Stint*, (*m*) the court resolved; 1st, "that if any matter appears in the declaration which showeth that the

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(*a*) Roll. Abr. 547.

(*b*) Cro. Eliz. 489. Moor. 422. Owen, 50. Noy, 35.

(*c*) Cro. Jac. 184.

(*d*) Cro. Jac. 493.

(*e*) Yelv. 46.

(*f*) Moor. 601.

(*g*) *Gibbons* v. *Roberts*, 1 Salk. 265.

(*h*) *Rowland* v. *Veale*, Cowp. 20. *Belk* v. *Broadbent*, 3 T. R. 183. *Williams* v. *Jones*, 14 L. J. 145.

(*i*) *Doe* v. *Parmeter*, 2 Lev. 81. *Smith* v. *Frampton*, 3 Lev. 405. *Simpson* v. *Merrell*, Carth. 53. *Higginson* v. *Martin*, 2 Mod. 195. *Mackereth* v. *Pollard*, Ld. Raym. 80. *Murray* v. *Wilson*, 1 Wils. 316. *Adams* v. *Freeman*, 2 Wils. 5.

(*j*) *Moravia* v. *Sloper*, Willes, 30, and the cases in note *a*, p. 37.

(*k*) *Laughton* v. *Taylor*, 6 M. & W. 675.

(*l*) *Hodgson v. Chetwynd*, 14 L. J. ex. 264.

(*m*) 2 Mod. 272.

cause of action did not arise *infra jurisdictionem*, there a prohibition may be granted at any time;" 2ndly, "if the subject-matter in the declaration be not proper for the judgment and determination of such court, there also a prohibition may be granted at any time." Where the jurisdiction is clear on the face of the proceedings a prohibition should be applied for before judgment. In the same case it was resolved, that if the defendant who intended to plead to the jurisdiction, is prevented by any artifice, as by giving a short day, or by the attorney's refusing to plead to it, &c., or if his plea be not accepted or is overruled; in all these cases a prohibition likewise will lie at any time. Now in the case of *Humby* v. *Roberts*, (*a*) the facts of which will be hereafter set forth, *Alderson*, B., said: "If the superior courts have jurisdiction to restrain the proceedings of inferior courts, there must of necessity and common sense be some power to restrain the inferior courts from proceeding upon a sentence passed when the superior courts are not sitting, and when no application can be made to them; otherwise they might commit any injustice, however great, and could not be stopped or prevented from doing so." If a case of probable injustice were made out to the satisfaction of the judge or court there does not seem to be any reason why the commissioner or court, acting always with great caution, should not allow a defendant the opportunity of applying to one of the superior courts.

It may happen that the judgment or order has not been entered. In that event it may be proved by the officer of the court or other person cognizant of the fact. For this position the case of *Dyson* v. *Wood* (*b*) is an authority. It was trespass for breaking and entering the plaintiff's dwelling-house; plea justifying under a judgment recovered in a court baron, and a precept issued thereon; replication, that there was not any memorandum of the proceedings, or of the said supposed judgment, remaining in the said court baron: demurrer, on the ground that the replication put in issue an immaterial fact. The replication, however, was held good, and *Abbot*, C. J. said: It is not necessary to inquire whether it be the duty of the steward to make an entry of the proceedings; but supposing that to be so, and he neglect to do his duty, I cannot say that the judgment has absolutely no effect. Giving the largest construction to the words of the replication, they may be considered to import that no memorandum exists or was ever made. And if so, the steward might be guilty of a misdemeanour by his neglect. But if he do so neglect his duty, that ought not to deprive a party of

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(*a*) 3 M. & W. 122. (*b*) 3 B. & C. 449.

his judgment. For the question whether judgment was given for him in such a court is a matter of fact; the entry would merely give him a facility of proof which he would not otherwise have. In pleas of judgments recovered in the superior courts, the allegation is that there is not remaining any record of such judgment, and that allegation imports that no such judgment was ever given; for the question whether it was or was not given is to be decided by the court on inspection of the record, and not by a jury. But a judgment may be proved as a fact, and by other evidence than a written memorandum; and that being so, the effect of this replication is not to deny that judgment was given in the court below, but merely that it is not capable of being verified by a particular species of proof." When, however, a judgment is proved by other evidence than a written memorandum, the essentials of the judgment must also be proved; that is, everything must be proved which the written judgment ought to show on the face of it. The inference from the case of *Dyson* v. *Wood* is that the judgments of an inferior court, not of record, may be proved partly by written memoranda, and partly by oral testimony.

The proceeding being upon an unsatisfied judgment, and its object being the enforcing payment to the party having the legal claim to and interest in the judgment only, the identity of the applicant with the person so entitled is not a matter of which it is necessary to require proof. An objection founded thereon should be taken at the time for impeaching the validity of the application; if it be not taken then, it will be a wholesome practice not to allow it to be taken at a subsequent stage of the proceedings.

If the person who appears denies that he is the defendant, then, upon his own showing, he has not a *locus standi*. The subsequent proceedings will be conducted on the supposition that the defendant has not appeared.

A judgment, decree, or sentence may be impeached by proof, *first*, that it never existed, or was void *ab initio; secondly*, that it was fraudulent and erroneous; *thirdly*, that it has been reversed. Reasons have already been given why courts that will have to administer the relief designed by the section under consideration, need not consider the first two modes. It is so unlikely that the last will arise in practice, that it does not seem necessary to discuss it.

The subject of payment, wholly or in part, seems also to be one that does not require discussion; besides that it pertains to an ulterior stage of the proceedings.

No action lies on a judgment if the defendant has been once taken or charged in execution on it, and this, although he have been discharged with the consent of the plaintiff on his undertaking to pay at a future day, and do not fulfil the

undertaking. (*a*) The application of this rule is subject to the provision in the second section of this Act.

It must be borne in mind by parties summoned, that proceedings against them as by default can only be avoided by attending "at the time to be appointed in such summons," or alleging a sufficient excuse. In the subsequent part of the section it is expressly provided that "in case such debtor shall not attend as required by the said summons, and shall not allege a sufficient excuse for not attending," the commissioner or court may order imprisonment.

> "*Shall be examined by the said commissioner or court, and shall, if the creditor think fit, be interrogated before such commissioner or court by the creditor summoning him, touching the manner and time of his contracting his debt, the means or prospect of payment he then had, the property or means of payment he still hath or may have, the disposal he may have made of any property since contracting such debt.*"

The debtor is to be "examined" by the commissioner or court, and, if the creditor think fit, shall be interrogated by the creditor before such commissioner or court. The examinations or interrogations will be on oath, because such a mode of conducting them will be most beneficial for promoting the ends intended by the Act, and therefore will warrant the exercise of the power to examine on oath that generally belongs to courts for the recovery of small debts. It is to be observed, that the provisions of the 5 & 6 Vict. c. 116, when not inconsistent with nor at variance from the provisions of the 7 & 8 Vict. c. 96, are maintained by the 74th section of the latter Act. Now the 4th section of the 5 & 6 Vict. c. 116, expressly directs that the commissioner of bankrupt shall examine on oath both the petitioner and the creditor. The object of that Act is "to protect from all process against the person such persons as have become indebted without any fraud or gross or culpable negligence, so as nevertheless their estates may be duly distributed among their creditors." Commissioners of the court of Bankruptcy will feel themselves empowered by the constructive reference to the 5 & 6 Vict. c. 116, to examine the debtor on oath; and as it cannot be contended that the debtor who appears before a court for the recovery of small debts shall make answer under a sanction less binding than that under which the debtor who shall appear before a commissioner of the court of Bankruptcy will have to make answer, courts for the recovery of small debts, it is submitted, ought to act similarly.

(*a*) *Vigers* v. *Aldrich*, 4 Burr. 2482. *Jacques* v. *Withey*, 1 T. R. 557. *Clark* v. *Clement*, 6 T. R. 525. *Tanner* v. *Hague*, 7 T. R. 420. *Blackburn* v. *Stupart*, 2 East, 243. *Taylor* v. *Waters*, 5 M. & S. 103.

The words of the section being, "by the creditor summoning him," it follows that, save the commissioner or court, no one but the creditor can examine the debtor.

The matter of the examination of the debtor is divided into the following heads:—1st. The manner of contracting "his debt," that is, the particular debt. The rule acted on in the Insolvent Court, that one creditor shall not appear for another, must be observed with more than ordinary strictness when a debtor is, as it were, showing cause against a rule *nisi* for issuing execution in a particular action only. The creditor must, in respect of any other debt, be considered a mere stranger. 2nd. The time of contracting the debt. 3rd. The actual means of payment which the debtor had when he contracted the debt. 4th. The prospect which the debtor had, at the time he contracted the debt, of ever possessing means of paying it. 5th. The property which the debtor actually has at the time when he is undergoing examination. 6th. The property which the debtor may have—become possessed of—thereafter. 7th. The disposal which the debtor may have made of any property whatsoever since contracting the debt. These interrogations will be explained below.

> "*And such creditor shall also, if such commissioner or court shall think fit, be examined by the said commissioner or court touching his claim against the said debtor, and shall, if the debtor think fit, be interrogated before such commissioner or court by the said debtor touching the said claim against him.*"

It is to be observed, that the duty of examining the creditor is not imposed on the commissioner or court. They are empowered to examine him if they shall think fit. The debtor will have the right of interrogating the creditor. The examination or interrogation will, it is submitted, on the grounds already advanced, be on oath. The subject-matter of the creditor's examination is to be, not the "debt" of the debtor, but the "claim" of the creditor against the debtor, that is, the debt subject to all the equities arising from the conduct of the creditor, and the demands on him from the debtor, at the time the debt was contracted and since. It has been observed that the interrogatories administered by the creditor ought to be confined to the circumstances of the particular debt; so also those administered by the debtor.

> "*And it shall be lawful for such commissioner or court to make an order on the said debtor for the payment of his debt by instalments or otherwise.*"

The power thus conferred depends upon what has gone

before. If the debtor has attended at the time appointed in the summons; if he has been examined; and if the creditor has attended also, and has also submitted to examination; then the commissioner or court may make an order for the payment of the debt by instalments or otherwise. It is plain that if the creditor does not appear, an order ought not to be made; for, first, it is to be presumed that the creditor has abandoned his application; and, secondly, if the debtor allege payment or an agreement for a mode of payment repugnant from the application, the presence of the creditor is necessary for contradiction or explanation. The order may be made for the payment of "his debt:" "his debt" is not confined to the "sum not exceeding twenty pounds," but includes the whole sum due on the judgment, that is, familiarly, debt and costs. The order may direct payment by instalments "or otherwise." The word "otherwise," in contradistinction from the phrase "by instalments," may have a larger signification than "in one sum." It may, for instance, include future work and labour, or future sale and delivery of goods, or set-off. It would seem, that without the consent of the creditor a claim of set-off could not be entertained, because the debtor should have urged that claim before; but with the consent of the creditor, there does not seem to be any reason why the claim of set-off should not be allowed. With regard to the other two modes that have been suggested, it seems but reasonable, if the parties can be induced to agree, that a conditional order embracing one or both of them should be made.

"*And in case such debtor shall not attend as required by the said summons, and shall not allege a sufficient excuse for not attending, or shall, if attending, refuse to disclose his property, or his transactions respecting the same, or respecting the contracting of the debt, or shall not make answer thereof to the satisfaction of the commissioner or court, or shall appear to such commissioner or court to have been guilty of fraud in contracting the debt, or of having wilfully contracted it without reasonable prospect of being able to pay it, or of having concealed or made away with his property in order to defeat his creditors, or if he appears to have the means of paying the same by instalments or otherwise.*"

This portion of the section is introductory to the power to imprison, and procceds on alternative hypotheses, the one that the debtor will not attend as required by the summons, and will not allege a sufficient excuse for not attending; the other, that the debtor will attend, but shall either not make answer, or shall make such answer as will be unsatisfactory to the commissioner or court. In either case the power to imprison may be lawfully exercised.

With regard to the first part, it is not simple non-attendance, but non-attendance and the not alleging a sufficient excuse for not attending, that will confer the power. The question therefore is, what is a sufficient excuse? It is somewhat difficult to lay down any rule on such a subject; in each case the commissioner or court must decide on the particular excuse urged, not admitting even a reasonable excuse unless it appear to be based on good faith: nor, on the other hand, so condescending to good faith as to introduce a bad and dangerous precedent. It will always be best to give the debtor an opportunity of being heard if so he shall please, and the judge may therefore very properly, with the consent of the commissioners, if the tribunal be a court of requests, make the order conditional on cause not being shown against it before a certain day, notice of showing cause to be given to the creditor, and the creditor's costs and expenses to be paid. It must also be borne in mind that the mere non-attendance of the debtor will not absolve the creditor from the necessity of proving, nor the judge from the duty of requiring that the creditor prove, all matter necessary to give jurisdiction. The second branch of the alternative contemplates the attendance of the debtor, and several possible states of facts consistent with his attendance, as—1st. That he refuses to disclose his property. 2nd. That he refuses to disclose his transactions respecting his property. 3rd. That he refuses to disclose his transactions respecting the contracting the debt which is the basis of the judgment. 4th. That he does not refuse to disclose either his property, or transactions concerning it, or his transactions respecting the contracting the debt, yet does not answer of them to the satisfaction of the commissioner or court. 5th. That he shall appear to the commissioner or court to have been guilty of fraud in contracting the debt. 6th. That he shall appear to the commissioner or court to have been guilty of having wilfully contracted the debt without reasonable prospect of being able to pay it. 7th. That he shall appear to have concealed his property in order to defeat his creditors. 8th. That he shall appear to have made away with his property in order to defeat his creditors. 9th. That he shall appear to have the means of paying the debt by instalments. 10th. That he shall appear to have the means of paying the same otherwise than by instalments.

These are the heads of the examination and interrogation both of the debtor and the creditor which the previous part of the section directs. In reading this part of the section it must be also recollected by the judge of a court of requests that the word "court" is used, and that it is contradistinguished from the word "judge," which is employed when the power of imprisonment is conferred.

With respect to the first four heads, the refusing "to dis-

close his property or his transactions respecting the same," or the contracting the debt, or the not answering satisfactorily, the debtor may be subjected to such an examination as shall tend to disclose those matters which the schedule of an insolvent debtor ought to make known. When the debtor attends, he is in fact showing cause against the issuing process, and should be subjected to the same ordeal with the petitioner against process. The schedule "is to contain a full and fair description of the 'petitioner' as to his name, trade, and profession. It is to state the 'petitioner's' last usual place of abode, and the places where he has resided during the time when his debts were contracted. It must set forth a full and true description of all debts due or growing due from the 'petitioner' at the date of the vesting order, and of all persons to whom he is indebted, or who, to his knowledge or belief, claim to be his creditors; together with the nature and amount of such debts and claims respectively, distinguishing such as shall be admitted from such as shall be disputed by the 'petitioner': and also a full, true and perfect account of all the estate and effects of the 'petitioner,' real or personal, in possession, reversion, remainder, or expectancy, and also of all places of benefit or advantage held by the 'petitioner,' of all pensions or allowances, of all rights and powers which shall in any way belong to the 'petitioner,' of all debts due, growing due, or claimed by the 'petitioner,' with the names and abodes of the persons so indebted; and also the nature of the evidence by which such debts or claims may be proved, so far as the 'petitioner' is able to set it forth." (*a*) The next four heads have already been discussed in a previous chapter. (*b*) On the last two it is only necessary to observe, that the word "otherwise" embraces, not only payment, present or future, in one sum, but also such other means as may be within the absolute disposal of the debtor, and might reasonably be applied by him to the particular purpose, as, for instance,—the allowance of a set-off. The word "appear" in the case of courts of requests confers the power of determining the fact on the commissioners present, if, according to the constitution of the court, they be in sufficient number.

"*And shall not pay the same at such times as the commissioner or court shall order, or as the court shall have ordered in which the original judgment shall have been obtained or order made.*"

The only mode of effectively carrying out the intentions of the legislature will be to make the word "shall" refer to a

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(*a*) Cooke's Insolvent Practice, 140. (*b*) *Supra*. pp. 11—22.

time future from the date of the enactment, and not from the time of the hearing. The clausule that immediately follows shows, that to give jurisdiction to imprison, there must be nonpayment after payment ordered. If the words "shall not pay," are not equivalent to "shall not pay, or shall not have paid," the nonpayment of monies that ought to have been paid before the application to the court will not furnish a ground for committing to prison, and so the intention of the legislature be defeated. The meaning then, it is submitted, is this:—If he appear not to have paid the debt at the time ordered by the court to which application is made, or by the court from which judgment has been obtained,

> "*Then in any of the said cases it shall be lawful for such commissioner or the judge of such court to order such debtor to be committed, for any time not exceeding forty days, to the common gaol wherein the debtors under judgment and in execution of the superior courts of justice may be confined within the county, city, borough, or place in which such debtor shall be resident, or to any other gaol or debtors' prison within the same county, city, borough, or place which shall by any declaration of one of Her Majesty's principal secretaries of state be allowed as a place of imprisonment under this Act, so long as such declaration shall remain in force and unrevoked.*"

The jurisdiction of the commissioners of bankrupts, or of the judge of a court for the recovery of small debts to order imprisonment, only arises "in any of the said cases;" that is, the case in which the debtor does not attend in obedience to the summons, and does not allege a sufficient excuse;—the case in which the debtor attends in obedience to the summons, but falls within one or more of the ten heads of delinquency treated above:—the case in which the debtor appears to have the means of paying the debt, and shall not have paid either at such times, (the plural is used, so as to meet the case of each instalment) as the commissioner or court from which the order of imprisonment is sought has ordered, or the court from which the judgment was obtained shall have ordered. The Act says, if the debtor shall not pay, it shall be lawful for the commissioners or judge to make the order for imprisonment, and that is an essentially different thing from saying, it shall be lawful for the commissioners or judge to order that if he do not pay he shall be committed to prison. It is apprehended that as this power of the commissioners or judge is founded on an application of the creditor, the doctrine of waiver expounded at page 18 applies.

It is the commissioner of bankrupts, or in the case of a court for the recovery of small debts, "the judge of such court," that is to "order" the debtor to be committed.

The 2nd section opens with these words, "that every bailiff and messenger to whom any such order shall be issued." It is clear therefore that the order for commitment and the warrant are to be included in one and the same instrument.

The definition of a warrant of commitment is this:—a precept in writing under the hand and seal of a magistrate having jurisdiction to issue it directed to the keeper of the prison to which the party is to be committed. An order of final commitment to prison must be in writing. (*a*) It must also be under the hand and seal of the magistrate making it; (*b*) it must set out not only the name of the magistrate, but his office or authority; (*c*) it must specify the cause, especially where the commitment is by way of punishment, and not for safe custody only. (*d*) The cause of the commitment must be decided with sufficient certainty, and when it proceeds on a statute, it must clearly bring the party to be committed within the predicament contemplated by that statute. (*e*) When the instrument which consigns a man to prison is also the instrument that convicts him of the conduct for which he is to be sent to prison, it must show on its face that everything has been done to make the conviction lawful. (*f*) This rule is inflexible in matters of procedure, concerning which so much has already been said, and it will be safe to follow it in matter of evidence. (*g*) The order must distinctly express the time for which the party is committed, and the condition upon which he is to be discharged, and both must strictly conform to the directions of the statute from which the authority is derived. The time is by the section under consideration limited to forty days. The prison must be "the common gaol wherein the debtors under judgment and in execution of the superior courts of justice may be confined within the county, city, borough, or place in which such debtor shall be resident, or to any other gaol or debtors' prison within the same county, city, borough, or place which shall by any declaration of one of Her Majesty's principal secretaries of state be allowed as a place of imprisonment under this Act, so long as such declaration shall remain in force and unrevoked." Thus a power is incidentally given to the secretary of state to declare any gaol or debtors' prison a place of imprisonment under this Act, either indefinitely or for a time certain, and also to revoke such declaration.

(*a*) 2 Hawk, P. C. c. 16, s. 13. *Mayhew* v. *Locke*, 2 Marsh. 377.

(*b*) 2 Hawk. P. C. c. 16, s. 13. *Dalton*, c. 196. 1 H. H. 583.

(*c*) 2 Hawk. P. C. c. 16, s. 13. 2 H. H. 122. *R.* v. *York*, 5 Burr. 2624. Exp. *Addis*, 2 D. & R. 167.

(*d*) *R.* v. *Rhodes*, 4 T. R. 220. 12 East, 78, n. (*a*). 2 Inst. 52, 591; 2 Hale, 122. *R.* v. *Cooper*, 6 T. R. 509. *R.* v. *Gourley*, 7 B. & C. 669.

(*e*) *R.* v. *Everett*, Cald. Car. 26. *R.* v. *Harpur*, 1 D. & R. 222. *R.* v. *Dugger*, 5 B. & A. 791. *R.* v. *Maby*, 3 D. & R. 578.

(*f*) In re *Tordoft*, 1 N. S. C. 171. In re *Gray*, Ibid. 354.

(*g*) See the observations of *Patteson*, J., 1 N. S. C. 360.

This section does not give a direct power to impose the payment of costs on the debtor.

The second section is in these words :—

"And be it enacted, That every bailiff and messenger to "whom any such order shall be issued, or who shall be acting "as an officer of the high bailiff of *Westminster* or *Southwark* "in the execution of any such order issued to such high "bailiff, shall be thereby empowered to take the body of the "person against whom such order shall be made, and all "constables and other peace officers within their several "jurisdictions shall aid in the execution of every such order; "and no protection, or interim or other order issuing out of "any court of bankruptcy or for the relief of insolvent "debtors, nor any certificate obtained after such order for "imprisonment under this Act, shall be available to any "debtor imprisoned under such order as aforesaid."

The reference to the high bailiff of *Westminster* and *Southwark* will be explained in discussing section thirteen.

Power is given to the officer charged with the execution of the order to take the body of the debtor and carry him to prison. The power to make the order being absolute "in any of the said cases," and the officer being bound by its terms, he will, it is presumed, if once the warrant be placed in his hands, execute it. The writ will authorize the officer to arrest and take the party to the particular prison named therein, but it will not authorize him to receive the debt and costs. When the debtor is once imprisoned, he cannot avail himself, for the purpose of discharge, of any protection, or interim or other order issuing out of any court of bankruptcy or for the relief of insolvent debtors, nor of any certificate obtained after such order for imprisonment under this Act. An interim order, or the like, obtained on the very day on which the order for imprisonment is made, but before it, will be available against it. (*a*) The meaning of the word "imprisonment" was much discussed in the late case of *Bird* v. *Jones, Law Times, No.* 124; and there seems no doubt that the doctrine of constructive imprisonment would include an arrest under the Act which is under consideration. If that be so, the production of an interim order, or the like, between the arrest and the actual lodgment in prison, if dated after the order, but before the day of arrest, would not avail the debtor.

The third section is in these words :—

"And be it declared and enacted, That no imprisonment "under this Act shall in anywise operate as satisfaction or "extinguishment of any debt or demand; but any person "imprisoned under this Act, who shall have paid or satisfied "the debt or demand, or the instalments thereof payable, "and costs remaining due at the time of the order of im-

(*a*) *R.* v. *The Justices of Middlesex*, 14 L. J. (n. s.) *m.* 139.

" prisonment being made, and all subsequent costs, shall, upon " entry of such payment indorsed on the order of imprison- " ment, signed by the plaintiff or his attorney, be discharged " out of custody by leave of a commissioner or judge of the " court in which the order of imprisonment was made."

As imprisonment under this Act shall not "in anywise" operate as satisfaction or extinguishment of any debt or demand, it follows, that though a party have been imprisoned for the not paying one instalment, the time for liquidating which may have arrived, he may nevertheless be again committed to prison, if he neglect to pay any subsequent instalment, and so on *toties quoties*, for he will still be within the language of the first section, and be indebted by force of a judgment or order in the nature of a judgment. By this section an order for imprisonment virtually becomes an order for the payment of the costs in the court that makes the order of imprisonment, and also the costs of execution. The "debt or demand" includes the costs of obtaining judgment.

The 23rd section of the Act provides that "all the enactments . . . . of the several Acts under which the said several courts are now held or constituted, shall, within their several districts, be deemed to apply to every proceeding under this Act, so far as the same are applicable, and not repugnant." Each of these Acts makes provision for costs of procedure, and for payment of them by the plaintiff in the first instance. So far then as courts of requests are concerned, the costs of proceeding to obtain the order will, if the court choose to exercise its power of awarding them, be "remaining due at the time of the order of imprisonment being made," The phrase "subsequent costs" must, if the view just stated be correct, signify the costs of execution.

It has before been observed that the order authorizes the arrest of the party, but does not authorize the officer to receive from the party the amount of the debt and costs. If the party arrested wish to pay the amount of debt and costs, or of the instalments, he should pay or tender it to the creditor or his attorney. The amount must cover the sum which, by the terms of the order for payment on which the order for imprisonment is founded, ought to be paid at the particular time, the costs remaining due at the time of the order of imprisonment being made, and all subsequent costs. Such payments made, there must also be, before the debtor can be discharged, an entry of such payment indorsed on the order of imprisonment, signed by the plaintiff or his attorney. Where a defendant, who was in custody under a *ca. sa.*, tendered the amount of the debt and costs to the plaintiff, but he refused to receive it, or to give a discharge, unless the defendant would pay a collateral demand for costs in another matter; it was holden that the defendant might maintain an action against him for maliciously refusing

to discharge him, and that the refusal to sign the discharge was sufficient *primâ facie* evidence of malice, in the absence of circumstances to rebut the presumption. (*a*) Such payment and entry made, the plaintiff "shall . . . . be discharged out of custody by leave of a commissioner or judge of the court in which the order of imprisonment was made." As the word "shall" is used, the leave of the commissioner seems to be ministerial only, and not to be withheld when the condition precedent has been fulfilled. The reason for requiring it seems to be, that the order for imprisonment, being founded on delinquency in the debtor, may be strictly enforced.

On considering the first three sections of the Act, it is plain that commitments under them differ from execution by *ca. sa.* Under the 59th section of the 7 & 8 Vict. c. 96, the judge was empowered "to order that such defendant may be taken and determined in execution." The power, therefore, of punishing fraud or recklessness was vested in the creditor only.

The fourth section of the Act is in these words:—

"And be it enacted, That the judge of every court of requests "or conscience, and of every inferior court of record for the "recovery of debts, and of every other court for the recovery of "small debts, of which the judge is a barrister-at-law or "special pleader, or an attorney of ten years' standing of one "of Her Majesty's superior courts of common law at *West-*"*minster*, in which court proceedings shall be had for the "recovery of any debt or demand within the jurisdiction of "the said court, shall have the like powers, in the suit in-"stituted for recovery of such debt or demand, of exa-"mining the parties to the suit, and, upon occasion of pro-"nouncing judgment therein, if judgment be given for the "plaintiff, shall have the like powers of further examining "the parties, and in the several cases hereinbefore specified, of "committing the defendant to prison, which he might exercise "under the provision hereinbefore contained, if judgment "for such debt or demand had been obtained in his court, "and the judgment creditor had obtained a summons for "such defendant from the same court under this Act; and "all the provisions of this Act shall be deemed to apply to "such case as if such summons had been obtained."

The words used are,—the judge "is" a barrister-at-law, &c. It is not necesssary in order that this section may take effect that there be an actually existing judge at the time the Act passed; it is enough that the constitution of the court be such that it may have a judge. The courts alluded to, therefore, are those which, either by their original constitution, or under the 7 & 8 Vict. c. 96, s. 72, may have a judge

(*a*) *Crozier* v. *Pilling*, 4 B. & C. 26.

who is a barrister-at-law, &c. In the latter case it is clear that the court must be one having commissioners. (*a*)

Upon this section it is only necessary to remark, that an order for imprisonment must show on its face that everything has been done to make it lawful, and, therefore, that an order made in exercise of the powers conferred by this section must show, both the progress of the suit in manner hereinbefore directed, and that the order was made upon occasion of pronouncing judgment. As these powers are only to be exercised "if judgment be given for the plaintiff," the defendant who has obtained a judgment of nonsuit against a plaintiff has, under this Act, only the remedy given by the first section.

The fifth section is in these words :—

"Provided always, and be it enacted, That in any city, "town, or district wherein there are several courts for the "recovery of small debts, neither of the said courts shall "have any power under this Act in respect of any debt which "shall have been sued for in the other of the said courts in "the same city, town, or district, unless such other of the "said courts shall not have a judge qualified as hereinbefore "specified."

It is much to be lamented that there has not been added to this section a provision for ousting the jurisdiction of commissioners of bankrupts, when both the judgment creditor and the judgment debtor reside within the jurisdiction of the court, being one for the recovery of small debts, from which judgment has been obtained.

The language of the sixth section is this :—

"And be it declared and enacted, That in making applica-"tion to any commissioner or court as aforesaid, or taking "any proceeding, under this Act, or under the Act of the "last session of parliament, intituled *An Act to amend the* "*Law of Insolvency, Bankruptcy, and Execution*, or under "an Act made in the sixth year of the reign of Her Majesty, "intituled *An Act for the Relief of Insolvent Debtors*, it shall "not be requisite for any party, whether creditor or debtor, "to employ either counsel or attorney or solicitor."

The advantages that will follow from this section will be very great, and may be summed up in the one phrase—waiver of mere irregularities.

The seventh section runs thus :—

"And be it enacted, That any affidavit of any prisoner in "any of Her Majesty's prisons or gaols in *England* to be "used in matters of bankruptcy or insolvency, or under or "by virtue of any statute relating to bankrupts or insolvent "debtors, or of this Act, may be sworn before the visiting or "other justice, or if within twelve hours none such shall

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(*a*) 7 & 8 Vict. c. 96, s. 72.

" attend, then by the principal keeper or gaoler of such prisons " or gaols respectively, and they and he shall be respectively " authorized and required to administer the oath upon any " such affidavit or affidavits."

There is an omission to add the time from which the twelve hours are to be computed, which is the more remarkable as the keeper of the prison is not only authorized, but required to administer the oath. It is presumed, however, that so long as he affords reasonable facilities to a party desirous of making an affidavit, the court will not require that the oath be administered exactly within twelve hours from the time when the debtor shall have given notice of his desire to make it.

The eighth section is in these words :—

" And whereas it is expedient to protect the actual neces- " saries of or belonging to judgment debtors from being seized " in execution ; be it enacted, That from and after the passing " of this Act the wearing apparel and bedding of any judg- " ment debtor or his family, and the tools and implements of " his trade, the value of such apparel, bedding, tools, and " implements not exceeding in the whole the value of 5*l*., " shall not be liable to seizure under any execution or order " of any court against his goods and chattels."

This is a substantive enactment, and applies to all cases of execution under a writ of *fi. fa.*

The language of the ninth section is this :—

" And be it enacted, That it shall be lawful for Her Majesty, " with the advice of her privy council, to enlarge the jurisdiction " of any such court of requests or conscience, or inferior court " of record for the recovery of debts, or other court for the re- " covery of small debts, to all debts and demands, whether on " balance of account or otherwise, or damage arising out of any " express or implied agreement, not exceeding 20*l*., and in such " cases as Her Majesty, with the advice aforesaid, may think " fit, to enlarge the district of any such court, or, where any " part of the district of such court is comprised within the " jurisdiction of any other like court, to contract the same, and " also to make any alteration or regulation for the holding or " sitting of any such court, both as to time and place, any " thing in any Act constituting any such court to the contrary " notwithstanding ; and all powers and authorities now vested " in any such court, the jurisdiction or district whereof shall " be so enlarged, or the district whereof shall be so contracted, " shall apply and extend to the jurisdiction or district given " or limited under the powers of this Act, and that as fully as " if such jurisdiction or district had been given by the Act " or Acts establishing or regulating such court and its pro- " ceedings ; provided always, that no such order shall take " effect in respect of any court which shall not have a judge " who is either a barrister-at-law or special pleader, or an

"attorney of one of Her Majesty's superior courts of common "law at *Westminster* who shall have practised as an attorney "for at least ten years; and in any court in which there shall "be no judge qualified as aforesaid, the person or persons to "whom the appointment of judge, or, if there be no judge, "to whom the appointment of any clerk of the court, belongs, "or the majority of such persons, who shall be present at a "meeting called for the purpose, shall, within three calendar "months next after the making of any such order, and also "within three calendar months next after any vacancy of the "said office of judge, appoint a judge, qualified as aforesaid, "subject to the approval of Her Majesty, to be signified under "the royal sign manual; and in default of any such ap-"pointment as aforesaid it shall be lawful for Her Majesty to "appoint a judge, qualified as herein-before provided, for the "court in which such default shall have been made; pro-"vided always, that no judge, clerk, or officer of any court "whose emoluments shall be increased under this Act, nor "any person or persons whose franchise or right of appoint-"ment to any office in any court shall become more valuable "under this Act, shall be entitled to any compensation for "any such increase of emoluments, or increased value of any "such franchise or right of appointment, if the same, or the "value of the same, shall be diminished or taken away by any "alteration in the constitution of the said court, or otherwise, "by Act of Parliament: Provided also, that notice of the in-"tention of Her Majesty, with the advice of her privy council, "to take into consideration the expediency of making any "such order, and of the time when the same will be considered, "shall be given in the *London Gazette* one calendar month at "least before the same shall be so considered."

The powers which this section confers on the Queen, are to be exercised by Her Majesty in council. The courts with respect to which it is to be exercised, are "such" court of requests, &c.,—that is, as in considering section 4 has already been shown, a court of requests, &c., having by its very constitution a judge who is a barrister, &c., or which is empowered to appoint to the office of judge, a person so qualified—and any other court for the recovery of small debts. The jurisdiction may be enlarged to all debts and demands, not exceeding 20*l.*, whether or not the debt or demand be for the balance of an account or not. The phrase is "on balance of account," and therefore does not embrace the balance of cross accounts. This is very much to be lamented, as in cases to which the ordinary money counts of pleadings are applicable, there does not seem to be any reason why the court which is competent to adjudicate on a claim of 20*l.* the balance of an account, should not also adjudicate on a claim of 20*l.* the balance of cross accounts.

The jurisdiction may also be enlarged to a claim of 20*l.* in the nature of damages for the breach of an express or implied agreement. Upon this subject it is only necessary to refer the reader to what has already been said at page 11.

Her Majesty in council is also empowered to enlarge the district of "any such court," that is, of any one of the courts described in the preceding part of the section; and, when any place is common to the jurisdiction of two such courts, but then only, to contract the district over which one of them has jurisdiction. She is also, with the like advice, empowered to make, not only any alteration in the time and place actually fixed for the holding or sitting of any such court, but to prescribe a regulation, that must not be departed from, for the future holding or sitting of any such court. The powers given to the Queen are to be exercised with the advice of her privy council; the enlarging the jurisdiction, therefore, and the other alterations are to be effected by an order in council. An order in council may be made at the royal pleasure, or on petition: Her Majesty in council therefore may enlarge the jurisdiction of any court, and make the other alterations and regulations indicated without waiting for an application in that behalf, and without being bound to defer to any remonstrance. The only limits to her authority are, the mode of proceeding,—by advice of the privy council,—and the time of proceeding,—not before the expiration of a month from the day on which notice of her intention, with the advice of the privy council, to take into consideration the expediency of making any such order, shall be given.

The order in council is not to take effect in respect of any court which shall not have a judge who is either a barrister-at-law, or special pleader, or an attorney of one of Her Majesty's superior courts of common law at *Westminster*, who shall have practised as an attorney for at least ten years. Those courts which have not such a judge, but which have the power to appoint one, either under particular Acts, or the 7 & 8 Vict. c. 96, s. 72, may proceed to appoint, and, should the jurisdiction of any court be enlarged, on petition or otherwise, the order in council will take effect at once. If the order in council be made, and the court have not a judge duly qualified as aforesaid, then the order in council cannot take effect until a judge shall have been appointed under the powers given by this section. It will, in that case, be incumbent on persons to whom the appointment of a judge belongs, if under any particular Act, or the 7 & 8 Vict. c. 96, there be a power to appoint a judge, or if there be no such power, to whom the appointment of clerk of the court belongs, or the majority of such persons who shall be present at a meeting called for that purpose, within three calendar months

next after the making of any such order, to appoint a judge "qualified as aforesaid, subject to the approval of Her Majesty, to be signified under the royal sign manual." The language of this part of the section differs materially from that of the 7 & 8 Vict. c. 96, s. 72. Under that section the commissioners, with the approval of the secretary of state, are to appoint, so making the approval of the secretary of state a necessary part of the act of appointing. Under this section the person or persons to whom the appointment belongs, or the majority of such persons—that is, the absolute majority, not the relative—are bound to appoint a person qualified. The appointment being subject to the approval of the Queen, to be signified under the royal sign manual, the appointment, though complete, will not be effective until such approval shall be so signified. So also, in case of a vacancy: if therefore the order in council be once made, the power to appoint under any other Act than that under consideration ceases. In default "of any such appointment as aforesaid," that is, of a qualified party by the competent persons within the limited time, but not in default of such approval, the power of appointment lapses to the crown.

All powers and authorities now vested in any court for the recovery of small debts, using that term generically, the jurisdiction or district of which shall be so enlarged, or the district whereof shall be so contracted, shall apply and extend to the jurisdiction or district given or limited under the powers of this Act, and that as fully as if such jurisdiction or district had been given by the Act or Acts establishing or regulating such court and its proceedings. If "as fully," then also irrevocably, except by Act of Parliament.

It is somewhat remarkable that, while this section guards against a title to compensation in any judge, clerk, or other officer whose emoluments shall have been increased under this Act, in the event of their being diminished, and while the 72nd section of the 7 & 8 Vict. c. 96, deprives an assessor thereunder appointed of any title to compensation for the loss of his office, or for any diminution in the value thereof, by reason of the passing of any general Act for the recovery of small debts, there is not any provision that deprives of a claim to compensation in the events indicated,—a judge appointed under this Act.

The tenth section is in these words:—

"And be it enacted, That every judge of any such court of "requests or conscience, or inferior court of record for the "recovery of debts, or other court for the recovery of small "debts, shall be removable by the lord chancellor for mis-"behaviour or incapacity."

The language of the eleventh section is this:—

"And be it enacted, That in all cases of debts and demands

"which were not within the jurisdiction of the court before "the passing of this Act, and also whenever the number of "commissioners present at any court shall not be sufficient "for the trial of causes according to the constitution of the "court before the passing of this Act, the judge shall act "alone, with all the powers of the court, and shall determine "all questions, as well of fact as of law, in the causes which "shall be brought before him."

The strict interpretation of this section will give to the judge exclusive jurisdiction over all causes which were not within the jurisdiction of the court before this Act passed. Now 20*l.* is the pecuniary limit of the jurisdiction that can be entrusted under this Act to any of the courts contemplated by it. But, under the first section, commissioners have, at the very least, concurrent jurisdiction with the judge on matters relating to debts not exceeding 20*l.* more complex, and requiring a higher judicial faculty than is necessary for determining the question debt or no debt on a simple contract demand for 20*l.* It does therefore seem unreasonable to give the commissioners jurisdiction in one case and not in the other. This provision may have the effect of deterring commissioners from attending when cases shall be heard which have been brought within the jurisdiction by the order in council only. Such a result would be much to be lamented; for undoubtedly, the vigilance of an intelligent and disinterested body of men, such as the commissioners, would be a safeguard against wilfulness or neglect in the judge. The phrase "debt or demand" is used in the 4th section of this Act, and there means cause of action in contradistinction from judgment debt; so also in this section.

The power of the judge to act alone in causes over which the court had jurisdiction before this Act, arises whenever "the number of commissioners present at any court shall not be sufficient, &c." So that it would appear that some commissioners must be present to give the judge power to act alone. If this be so, the attendance of some commissioners will be necessary to give jurisdiction for adjudicating on causes that might have been tried according to the constitution of the court before the passing of this Act. In the particular circumstances that confer on the judge "all the powers of the court" he will be entitled to make an order for the payment of money, and therefore to exercise the powers conferred by the 7 & 8 Vict. c. 96, s. 59, although execution may have issued.

This section would seem to apply although the jurisdiction has not been enlarged.

The words of the twelfth section are these:—

"And be it enacted, That in all cases of illness or un-"avoidable absence, the cause whereof shall be entered in the "minutes of the court, it shall be lawful for the judge, or, in

"case of the inability of the judge, for the commissioners, or "the person or persons to whom the appointment of the "judge belongs, to appoint a deputy, qualified as is herein- "before provided in the case of the judge, to act for him "during such illness or unavoidable absence; and it shall "also be lawful for the judge, with the approval of the per- "son or persons to whom the appointment of judge belongs, "and of one of Her Majesty's principal secretaries of state, "to appoint a deputy, qualified as aforesaid, to act for him "for any time or times not exceeding in the whole one "calendar month in any consecutive period of twelve calen- "dar months; and any deputy so appointed, while acting "under such appointment, shall have all the powers and "perform all the duties of such judge: Provided always, "that, independently of the power herein contained, every "judge shall have the same power of appointing a deputy "or deputies to hold his court for all cases of debts and de- "mands within the jurisdiction of the court as it was consti- "tuted before the passing of this Act which he has under the "Act or Acts according to which the court is now constituted, "and that such deputy or deputies, if qualified as is herein- "before provided in the case of the judge or in the case of "any deputy appointed before the passing of this Act, if ap- "proved by one of Her Majesty's principal secretaries of "state, shall have in all cases within the extended jurisdiction "of the court the powers and privileges, and be subject to the "same liabilities, and perform all the duties, of such judge "while acting under such appointment."

The thirteenth section runs thus:—

"And be it enacted, That, until Parliament shall other- "wise direct, the execution of all process issuing out of any "of the last-mentioned courts, the jurisdiction of which shall "include the city and liberty of *Westminster* or any part "thereof, shall belong to the high bailiff of *Westminster*, and "out of any court the jurisdiction of which shall include "the borough of *Southwark*, or any part thereof, shall "belong to the high bailiff of *Southwark*."

The phrase used is "execution of all process." It does not therefore include service of process.

The fourteenth section is in these words:—

"And be it enacted, That the judge of any such court, the "jurisdiction or district whereof shall be extended under "the powers of this Act, shall, subject to the approval of "one of Her Majesty's principal secretaries of state, frame "a table of fees to be payable by the suitors of such court "or courts in respect of every proceeding therein; and a "table of such fees shall be put in some conspicuous place "in the court-house and in the clerk's office; and the fees "on every proceeding shall be paid, in the first instance, by

" the plaintiff or party on whose such behalf such proceeding " is to be had, on or before such proceeding; and all such " fees shall be received by the clerk or clerks of such court, " who shall account to the other officers of such court for " the amount or proportion thereof which shall be payable " to them respectively, and shall also in the month of " *March* in every year render to one of Her Majesty's " principal secretaries of state an account of all such fees " which shall have been received in the year ending on the " last day of *December* then next preceding: Provided " always, that it shall be lawful for the secretary of state " to lessen the amount of the fees to be taken in any one or " more of the courts the jurisdiction or district whereof " shall be extended as aforesaid, in such manner as to him " shall seem fit, and again to increase such fees, so that the " scale of fees given in the schedule to this Act marked (C) " be not in any case surpassed: Provided also, that in all " cases where any judge, clerk, or other officer of any such " court shall have been paid by salary instead of fees, such " judge, clerk, or other officer shall continue to receive such " salary in respect of the business now within the jurisdic- " tion of such court, and, in respect of the business under " the powers of this Act, such fees applicable thereto " as are set in the said schedule (C), or such additional " salary instead of such fees as the secretary of state shall " direct; and all sums payable in the name of fees to any " such judge, clerk, or other officer, over and above the " amount of such salary, shall be applicable for such pur- " poses and in the manner prescribed by the Act or Acts of " Parliament under which such court is constituted; and " that in awarding compensation to any judge, clerk, or " officer of any such court under the provisions of the said " Act of the last session of Parliament, account shall be " taken of the fees and emoluments to which he shall be- " come entitled under this Act, and any increase of his fees " and emoluments under this Act shall go in diminution of " the amount to be awarded to him for such compensation."

It is to be hoped that, for the sake of economical process, the judge will so regulate the fees as that the service of process may, when the suitor desires it, be effected by the latter. It may be observed that the eighteenth section, which directs that the service of summonses on witnesses shall be effected by "a messenger or bailiff," raises, not remotely, an argument, that other process may be served by the parties.

The eighteenth section is in these words:—

" And be it enacted, That either of the parties to the suit " or any other proceeding before any such commissioner or " in any such court may obtain summonses to witnesses, to

" be served by a messenger or bailiff, with or without a clause " requiring the production of books and writings in their " possession or control, and in any such summons any num- " ber of names may be inserted ; and every person on whom " any such summons shall be personally served within the " jurisdiction of the court, and to whom at the same time " payment or tender of his expenses shall have been made, " on such scale of allowance as shall be from time to time " settled by the court of bankruptcy or judge of any such " court as aforesaid, as the case may be, with the approval " of one of Her Majesty's principal secretaries of state, and " who shall refuse or neglect, without sufficient cause, to " appear, or to produce any books or writing required by " such summons to be produced, and also every person pre- " sent in court who shall be required to give evidence, and " who shall refuse to be sworn and give evidence, shall for- " feit and pay such fine not exceeding 5*l.* as the commissioner " or judge shall set on him, and payment of such fine shall " be enforced in like manner as payment of any debt reco- " vered by judgment of any court of competent jurisdiction ; " and the whole or any part of such fine, in the discretion " of the judge, after deducting the costs, shall be applicable " toward indemnifying the party injured by such refusal " or neglect, and the remainder thereof shall be applicable " to the expenses of the court in which the fine was " imposed."

These remedies against refractory witnesses are, in the case of courts of requests, cumulative on those which the judge may possess under the particular Act or Acts by which the court is constituted or regulated. (*a*) The rules that have been laid down for framing an order of imprisonment under section 1 are applicable to orders under this section also. The conditions of the right to make the order are :— 1st, The existence of a suit or a proceeding before the commissioner or court. 2nd. The fact that a summons, including the particular individual against whom the application of the power given by this section is sought, has been obtained by one of the parties to the suit or other proceeding. 3rd. That it was personally served upon him by a messenger or bailiff. 4th. That it was so served upon him within the jurisdiction of the court. 5th. That payment or tender of expenses was made. 6th. A particular act of disobedience. The order should recite that so many of the conditions of the right as are susceptible of proof on oath have been so proved.

The scale of fees ought to be settled forthwith.

(*a*) *R.* v. *Wright*, 1 Burr. 543. *R.* v. *Robinson*, 2 Burr. 797. *R.* v. *Boyall*, Ibid. 832. *R.* v. *Harris*, 4 T. R. 202.

The order will be executed under the second section, or the combined operation of the second and twenty-second, which latter provides for the execution of warrants, and the levying execution out of the jurisdiction.

On the other sections it were beyond the purposes of this work to comment. It may be observed, however, that some nice and difficult questions will arise probably on the twenty-first section.

The twenty-third section enacts, that all the enactments of the 7 & 8 Vict. c. 96, and of the several Acts under which the said several courts as now held or constituted, shall within their several districts be deemed to apply to every proceeding under this Act, so far as the same are applicable, and not repugnant to the provisions of this Act. The 7 & 8 Vict. c. 96, this Act, and the Act or Acts of each particular court, are therefore to be considered as one, and all inconsistencies and repugnancies arising therefrom are to be remedied by applying the Act now under consideration.

CHAPTER IV.

OF THE JURISDICTION OF COURTS OF REQUESTS IN GENERAL, AND OF THE WRIT OF PROHIBITION.

The jurisdiction of the several courts of requests is strictly dependent on the particular Act or Acts of Parliament by which each is constituted, regulated, and governed. This rule applies, not only to the local extent of the jurisdiction, but also to the parties to sue and be sued, to the amount and nature of the debts for which a plaint may be brought, and to the consequences of suing in any other court. In some instances the jurisdiction created by the particular Act of Parliament is exclusive, in others it is concurrent. When it is merely concurrent, and not exclusive, the plaintiff is at liberty, if he think fit, to bring his action in one of the superior courts for the recovery of any demand, however trifling, in the same manner as if a local tribunal did not exist. If the particular Act of Parliament expressly prohibit the plaintiff from bringing his action elsewhere than in the local court, the defence may be pleaded or taken advantage of as a ground for nonsuit in the superior courts; but, if the defendant neglect to avail himself of either of these modes of defence, he cannot afterwards obtain leave to enter a suggestion on the roll. (*a*) In every case advantage is to be taken of the local Act, by plea, suggestion, or motion according to its express provisions. As a general rule it may be laid down, that the courts will neither stay proceedings before verdict, (*b*) nor set aside a judgment, (*c*) on the ground that a demand was recoverable in a court of requests. To take away the jurisdiction of the superior courts, the words of the local Act must be most clear. When the Act does not contain a prohibitory clause, but merely operates to deprive the plaintiff of costs, or to give costs to the defendant, the latter may, in general, move either to stay the proceedings upon payment of the debt without costs, or for leave to enter a suggestion on the roll to deprive the plaintiff of costs. The rule, it has been said, is, that when it is intended to call on the successful party to pay costs, it is necessary to enter a suggestion; but when

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(*a*) *Clark* v. *Hamlet*, 1 Har. & Woll. 177.

(*b*) *Meredith* v. *Drew*, 8 Bin. 141.

(*c*) *King* v. *Myers*, 5 Dowl. 687.

the purpose is simply that of exonerating the party applying, a motion will be sufficient. (*a*) If the mode of taking advantage of the particular act be specifically prescribed, it must be complied with to the letter. From the decisions that have been pronounced in the matter of applications for depriving plaintiffs of costs, on the ground that they had preferred the general jurisdiction of a superior court to that exercised by the local tribunal, some rules for construing Courts of Requests Acts, may be gathered.

The payment of money into court was said by Lord Ellenborough to be an admission of the jurisdiction of the superior court, so as to prevent a defendant from taking any objection on the ground of a Court of Conscience Act; (*b*) and it will so prevent the defendant, even though a tender be pleaded therewith, and the issue on the tender be found for the defendant. (*c*) Not so, however, in the case of an absolute tender of the whole amount. (*d*) And it is now settled that a plea of payment into court does not preclude a defendant from the benefit of the Courts of Requests Acts. (*e*) All the Courts of Requests Acts are in *pari materia*, and they must receive a similar construction. (*f*) It is settled that the amount found by the verdict of the jury, and not the sum which the plaintiff claims to be due, is to be considered the debt for which the action is brought, and is to decide whether the plaintiff ought to have sued in the court of requests, otherwise there would be contradictory affidavits. (*g*) Therefore, when by the plea of the statute of limitations, the sum recovered was reduced below the maximum sum fixed by the Act, and the words of the Act were, "debt to be recovered . . . *doth not amount*," it was held that the plaintiff was not entitled to costs. (*h*) When jurisdiction was given to a court of requests, where the plaintiff "*shall demand* any sum of money not exceeding the sum of five pounds, &c.;" this was held to mean, "shall rightfully demand," and that if the plaintiff sued elsewhere, and recovered less than 5*l*., he would not be entitled to his costs. (*i*) The sum recovered is the test of the rightfulness of the demand, and the defendant will be entitled to a suggestion to deprive the plaintiff of his costs, when the latter does not recover a sum beyond that over which the particular Act gave jurisdiction to the local

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(*a*) *Lawson* v. *Moggridge*, 1 Taunt. 396.
(*b*) *Miller* v. *Williams*, 5 Esp. 19.
(*c*) *Waistell* v. *Atkinson*, 3 Bin. 289.
(*d*) *Jordan* v. *Strong*, 5 M. & S. 196.
(*e*) *Bernard* v. *Turner*, 1 M. & W. 580.
(*f*) *Shaddick* v. *Bennett*, 4 B. & C. 769.
(*g*) *Baddley* v. *Oliver*, 1 Dowl. P. C. 598; *Stilwell* v. *Bracher*, 3 Dowl. N. S. 231. *Fairbrass* v. *Petit*, 8 J. P. 723.
(*h*) *Shaddick* v. *Bennett*, 4 B. & C. 769.
(*i*) *Drew* v. *Coles*, 1 Dowl. P. C. 580.

court, even though the demand was for more, and would so have been proved but for the absence of witnesses; (*a*) and this even in the case of an award. (*b*) Whether, when the defendant has allowed judgment to go by default, and the damages have been assessed upon a writ of inquiry, the defendant may take advantage of a Court of Conscience Act, by entering a suggestion to deprive the plaintiff of costs, or by moving that the proceedings be staid on payment of the damages assessed without costs, must depend on the language of the Act. Under the London Act, by which the "judge or judges, before whom the same shall be tried or heard," were empowered to certify, &c., if they should think fit,—it was held that the defendant, after judgment by default and damages assessed upon a writ of inquiry, was entitled to move to have the proceedings staid on payment of the damages assessed—without costs. (*c*) But under the Middlesex Act, where the words are, "and the jury upon the *trial* of such cause shall find the damages for the plaintiff under the value of forty shillings, unless the judge shall, in open court, &c," it was held that there must be a trial. (*d*)

Where a court of requests has jurisdiction over the cause of action, and the statute by which it is constituted gives the defendant leave to plead the matter specially, then, upon such plea being pleaded, and the jury finding a verdict for the defendant upon it, the entry of a suggestion upon the roll is unnecessary. (*e*)

When there is a plea of tender as to part, and of non-assumpsit as to the residue, and the plea of tender is found for the defendant, the balance proved on the non-assumpsit, if under 40*s*., must be added to the amount tendered, in order to determine whether the sum recovered is within the limits fixed by a local Act. (*f*) A plea of infancy, which, at the trial, reduces a demand exceeding the maximum fixed by a local Act to a sum less than it, entitles a defendant, in other respects within the Act, to avail himself of its provisions by suggestion. (*g*) A defendant—the words of the Act being, "the debt to be recovered . . . . . *doth not amount to*"—is entitled to a suggestion for costs, even though it appear that, if the plaintiff had commenced his action a few months later, his cause of action would have been good for more than the maximum fixed by the Act; (*h*) and

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(*a*) *Moore* v. *Jones*, 2 Dowl. P.C. 58.

(*b*) *Butler* v. *Grubb*, 2 Tidd's Practice, 884.

(*c*) *Dunster* v. *Ray*, 8 East, 239.

(*d*) *Strutton* v. *Whetwell*, 1 M. & R. 562. *Jackman* v. *Cother*, 7 Dowl. P. C. 805. *Harris* v. *Lloyd*, 4 M. & S. 171.

(*e*) *King* v. *Walford*, 7 Jur. 994. *Defries* v. *Snell*, 4 Dowl. 680.

(*f*) *Heaward* v. *Hopkins*, 2 Doug. 448. *Jordan* v. *Strong*, 5 M. & S. 196.

(*g*) *Bateman* v. *Smith*, 14 East, 301.

(*h*) *Tucker* v. *Crosby*, 2 Taunt. 169.

though the plaintiff believed that he had a cause of action for more than that sum.(*a*) So, where the sum sued for amounted to 6*l.*; a verdict was taken by *consent* for 5*l.*; the local Act gave jurisdiction to an amount not exceeding 5*l.*, and enacted that, "if any action or suit for any debt recoverable by virtue of this Act in the said court of requests shall be commenced in any other court," &c. then the plaintiff should not be entitled to costs: it was held, that the plaintiff was not entitled to costs.(*b*) But, when the issue is upon a plea in abatement in misnomer, and the verdict is found for 1*s.* damages, the defendant will not be entitled to enter a suggestion, the words being, "and the jury upon the trial of such cause shall find the damages for the plaintiff under the value of forty shillings."(*c*)

Several of the Courts of Requests Acts contain clauses that exclude from the jurisdiction of the courts they create, debts nominally within the amount limited by the local act, but in reality the balance of an account that originally exceeded that amount. We have already seen that where the reduction of the original sum is effected by payment of money into court, or tender of part, the defendant is not entitled to take advantage of the local Act. So, also, in the case of set-off. Thus, where a plaintiff sued a defendant for 22*l.* for work and labour, who pleaded a set-off amounting to 16*l.*, but refused to furnish the plaintiff with an account until after the commencement of the action, in which the plaintiff recovered a verdict for less than 10*l.*; it was held that the defendant was not entitled to enter a suggestion on the roll, under the Bath Act, to deprive the plaintiff of his costs. (*d*) But where a plaintiff recovers less than 40*s.* against a defendant resident within the jurisdiction of the Middlesex Act, and his demand has not been reduced by set-off, the defendant is entitled to double costs, (*e*) as when it has been reduced by part payment. (*f*) The Blackheath Court of Requests Act (6 & 7 Will. 4, c. 122, s. 22,) excepts out of the jurisdiction of the court any debt "for any sum, being the balance of an account originally exceeding the sum of 5*l.*" This exception was held not to apply to an account containing items amounting to upwards of 5*l.*, and reduced by payments from time to time below that sum, where it appeared so much as 5*l.* was not at any time due. (*g*) Where an action was brought in

(*a*) *Younger* v. *Kilsby*, 6 Taunt. 452.

(*b*) *Oakes* v. *Albin*, 13 Price, 793.

(*c*) *Welchen* v. *Le Pelletier*, 1 Chit. 636 n. See also *Todd* v. *Emly*, 12 L. J. N. S. Ex. 374.

(*d*) *Cottle* v. *Langman*, 9 Moore, 625. *Gobed* v. *Birt*, 2 Chit. 394. *Jenkinson* v. *Morton*, 1 M. & W. 300.

(*e*) *Jones* v. *Harris*, 1 Dowl. P. C. 374. *Humphries* v. *Arnot*, 1 Dowl. P. C. 376.

(*f*) *Nightingale* v. *Barnard*, 4 Bing. 169. *Home* v. *Hughes*, 8 East, 317.

(*g*) *Pope* v. *Banyard*, 3 M. & W. 424.

the King's Bench for a debt of 9*l.* 17*s.* and the plaintiff's demand was reduced by partial payments on account, and the jury found a verdict for the plaintiff for 1*l.* 13*s.*, it was held that the defendant, who resided within the jurisdiction, was entitled, under the Middlesex Act, to his double costs of suit, (*a*) although it appeared by affidavit that the debt originally exceeded 40*s.*, and although the plaintiff had failed in proving some of the items in his bill. Where a demand for plumbers' work and new materials found, amounting in value to 8*l.*, was reduced below 5*l.* by the plaintiff's taking the old lead and allowing for it, instead of using it as far as it would go, in which case the original demand would have been under 5*l.*, under the Southwark Act, 46 Geo. 3, c. 17, it is not a demand reduced below 5*l.* by balancing an account within the exceptions in the 12th section. (*b*) But where the plaintiff sued in a superior court for 34*l.*, ascertained by a surveyor to be due to him for measured work and labour, done within the jurisdiction of the Rochester court of requests, and the defendant proved payment to the amount of 24*l.*, and the jury estimating the work at 26*l.*, found for the plaintiff only 1*l.* 2*s.* damages, it was held, that this was not a case in which the defendant was entitled to enter a suggestion to deprive the plaintiff of costs, under stat. 48 Geo. 3, c. 51, on the grounds,—first, that he had reasonable cause for litigating his demand; secondly, that, if the defendant intended to take advantage of 22 Geo. 3, (where the words are prohibitory,) it should have formed part of his defence at the trial; and, lastly, that it fell within the exceptions contained in the 13th section of the 48 Geo. 3, as being the balance of an account or demand originally exceeding 5*l.* (*c*) And in an action to recover 3*l.* 6*s.* 6*d.* remaining due to the plaintiff on a bill of exchange for 8*l.* 6*s.* 6*d.*, which bill was given to secure the balance of an account between the parties originally amounting to more than 400*l.*, it was held, that the defendant was not entitled to enter a suggestion to deprive the plaintiff of his costs under the Boston Act (47 Geo. 3, sess. 2, c. 1), as section 15 provides that the commissioners are not empowered to decide on any debt for any sum being the balance of an account or demand originally exceeding 5*l.* (*d*) The general result from the cases is, that where the original debt is beyond the amount to which the jurisdiction of the local court extends, but is brought within it by cross demands, tender or payment of money into court, and not merely by payments on account, the plaintiff is entitled to sue in the superior courts; but that where payments

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(*a*) *Chadwick* v. *Bunning*, 5 B. & C. 532.

(*b*) *Porter* v. *Philpot*, 14 East, 344.

(*c*) *Harsant* v. *Larkin*, 3 B. & B 257.

(*d*) *Abbey* v. *Lill*, 5 Bing. 299.

have from time to time been made on account, so that the debt did not at any time exceed the amount to which the jurisdiction is limited, the case falls within the operation of the Acts, and the court will interfere to deprive the plaintiff of his costs. The reason was well stated by the court in the case of *Pitts* v. *Carpenter*, (*a*) where it was said, "Though the damages were under 40*s*., it is plain the real demand was above 40*s*.; and how could the plaintiff tell whether the defendant would set off anything in that action, so as to be bound to choose that jurisdiction?" Similar reasoning applies to the cases of payment into court and tender.

When the defendant pleaded payment of 1*l*. 18*s*. into court in satisfaction of the cause of action, and the plaintiff took the money out of court, it was held, that the defendant was not entitled to enter a suggestion on the roll to deprive the plaintiff of costs on the ground that the action was brought to recover a less sum than 40*s*., and therefore recoverable in the county court. (*b*)

The application should be made, if possible, before final judgment; (*c*) but it is immaterial whether the cause has been tried before a judge, or before the sheriff, under a writ of trial. (*d*) But when judgment has been signed and execution issued in vacation, the court will not refuse to entertain the application, if made as early as possible in next term. (*e*) When the cause has been removed from the inferior court by *certiorari*, the affidavit in support of a motion to stay proceedings may be intituled as if the cause were pending *in* the court. (*f*) In order to support an application to stay proceedings in the Brighton court of requests, a writ of *certiorari* must issue; the rule for which is absolute in the first instance. (*g*) If the judge, in his return to a *certiorari*, omits some of the proceedings which have taken place with respect to the plaintiff's claim, the omission may be supplied by affidavit. (*h*)

A court for the recovery of debts under 40*s*. may give judgment for the plaintiff, although the debt be above 40*s*., if the plaintiff will waive so much of his debt as will bring the claim under 40*s*., provided that there be nothing in the Act of Parliament constituting the court that prevents this. (*i*)

The species of actions included within the jurisdiction depend on the language of the particular Act of Parliament; but as all the Courts of Requests Acts are in *pari*

(*a*) 2 Str. 1191.
(*b*) *Tarrant* v. *Morgan*, 2 C. M. & R. 253.
(*c*) *Unwin* v. *King*, 2 Dowl. 593.
(*d*) *Shaw* v. *Oates*, 2 Dowl. 720.
(*e*) *Bond* v. *Bailey*, 3 Dowl. 808.
(*f*) *Franks* v. *Wicks*, 9 Dowl. P.C. 178.
(*g*) Ibid.
(*h*) Ibid.
(*i*) *Barnes* v. *Winkler*, 2 C. & P. 345.

materiâ, the construction adopted in one instance will serve to foreshow the construction that, in all probability, will be enforced in another. The London Court of Requests Act, 14 Geo. 2, c. 10, which enables certain persons to sue for *debts* under 40*s*. in that court, was held not to extend to cases where the plaintiff recovered less than 40*s*. in a special action on the case for the breach of an agreement.(*a*) The jurisdiction of the Westminster Court of Requests is also confined to debts, and does not extend to actions on the case for unliquidated damages; as for instance, to a claim for compensation for attending the revising barrister to oppose unfounded objections.(*b*) The London Court of Requests' Acts confer jurisdiction over liquidated demands, though there are special counts; but not in cases where it is sought to recover unliquidated damages; as for instance, on a count for not returning goods unsold.(*c*) Section 13 of the 39 & 40 Geo. 3, c. 104, enacts "that nothing herein contained shall extend or be construed to extend to prevent or restrain any person or persons from making distress, or bringing any action or actions whatsoever for rent, and thereby recovering such rent, with costs, although the same rent should not exceed the sum of 5*l*.," the limit fixed by the Act. It was held that an action for the use and occupation of *furnished* lodgings was within it, and might be brought in the superior courts, without the plaintiff's incurring the penalties in section 12:(*d*) and so also of an action for money had and received, brought against the receiver of an estate, to recover money received by him for rent, for the purpose of trying the title of the estate.(*e*) The 11th section of the Act last named enacts, "that this Act, or any thing herein contained, shall not extend to any debt where any title of freehold, or lease for years, of any lands or tenements shall come in question; or to any debt by specialty, which shall not be for payment of a sum certain, nor to any other debt that shall arise by reason of any cause concerning testament or matrimony, or any thing concerning, or properly belonging to, the ecclesiastical court, albeit the same respectively shall not exceed 5*l*., anything herein contained to the contrary notwithstanding;" it was held, that the court of requests had jurisdiction over an action for tithes where the amount recovered upon a count in *assumpsit* for a *quantum valebant* amounted to less than 5*l*.(*f*) The statute 39 & 40 Geo. 3, c. 104, extends

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(*a*) *Jones* v. *Greening*, 5 T. R. 529. *Webb* v. *Brown*, 5 T. R. 535.

(*b*) *Soames* v. *Rawlings*, 4 Dowl. P. C. 401.

(*c*) *Porter* v. *Harper*, 2 C. M. & R. 683.

(*d*) *Kidd* v. *Mason*, 3 Dowl. P. C. 56.

(*e*) *Drew* v. *Fletcher*, 1 B. & C. 283.

(*f*) *Sandby* v. *Miller*, 5 East, 194.

to the assignees of a bankrupt;(*a*) and the court will not refuse leave to enter a suggestion, on the ground that a court of conscience has not authority to try a question of bankruptcy,(*b*) unless, indeed, there be a special provision, as in the Middlesex Act there is, that the fact of an act of bankruptcy principally coming in question shall, if certified by the judge, be a reason. Under the Middlesex Act, the words of which are very general, an administrator may bring an action;(*c*) but an executor cannot be sued.(*d*) The jurisdiction of a court of conscience does not extend to contracts made on the high seas.(*e*) The Southwark Acts extend to any "action on the case upon an assumpsit for the recovery of any debt, &c." but this does not include an action upon the case for negligence in driving the plaintiff's carriage contrary to an implied *assumpsit*.(*f*) The Bath Court of Requests Act, 45 Geo. 3, c. 67, s. 16, gives jurisdiction to decide and determine "all disputes and differences between party and party for any sum not exceeding 10*l*. in all actions or causes of debt, whether such debt shall arise from any bond, bill or specialty for money only, or any promissory note, or inland bill of exchange, or for rent upon leases, articles, minutes; and in all cases of *assumpsit* and *insimul computasset*, and in all causes or actions of trover and conversion, and in all causes or returns founded on a *quantum meruit*, and in all causes or actions of trespass or detinue for goods and chattels taken or detained." Section 17 enacts, "that nothing in this Act contained shall extend or be construed to extend so as to enable the said commissioners to determine the right or title to any land, &c. or to judge, determine or decide on any debt by reason of any cause concerning testament or matrimony, or anything concerning or properly belonging to the ecclesiastical court." Held, that *assumpsit* for use and occupation was within the Act;(*g*) that trover was not;(*h*) nor a claim made by a voter against an objector, for compensation for loss of time in attending the revising barrister's court on a notice of objection.(*i*) The Brighton Court of Requests' Act enacts, "that it shall not be lawful for any plaintiff to divide any 'cause of action' into two or more suits, for the purpose of bringing the same within the jurisdiction of the court." Held, that where a plaintiff had three demands—one for a horse sold, another for rent due, and a

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(*a*) *Ward* v. *Abrahams*, 1 B. & A. 367.

(*b*) *Kear* v. *Bigg*, 1 B. & P. 11.

(*c*) *Wase* v. *Wyburd*, 1 Doug. 246.

(*d*) *Ailway* v. *Burrows*, 1 Doug. 263.

(*e*) *M'Callum* v. *Carr*, 1 B. & C. 223.

(*f*) *Lawson* v. *Moggridge*, 1 Taunt. 396.

(*g*) *Axon* v. *Dallemore*, 3 D. & R. 51.

(*h*) *Weare* v. *Calder*, 9 D. & R. 546.

(*i*) *Roberts* v. *Humby*, 3 M. & W. 120.

third for goods sold and delivered, he was not precluded from suing in the superior court for the last-named two demands, by the fact of his having sued for and recovered the price of the horse in the inferior court; for that the three demands were separate and distinct, and were not all one "cause of action" within the meaning of the Act. (*a*)

The cases of *Wase* v. *Wyburd*, (*b*) and *Ailway* v. *Burrows*, (*c*) are exceedingly important. In the first, an administrator sued, and Lord *Mansfield*, C. J., asked, whether there was any exception as to administrators in the statute; and on receiving for answer that there was none, he ordered the rule for entering a suggestion to deprive the plaintiff of his costs, to be made absolute. In the latter case, an executor was sued, and the same distinguished judge said:—"The court will not permit the suggestion of a matter on the rolls, unless it appear to be relevant, and it could not be meant to give this court of conscience jurisdiction over executors. If there is no express exception, there is an implied one from the nature and reason of the thing;" and the rule for a suggestion was discharged. The conclusion would seem to be this, that when the plaintiff is within the reason of the statute, it will require express words to deprive him of the right or absolve him from the duty to sue; but that, when the defendant is not within the reason of the statute, express words will be necessary to bring him within its provisions. This position is confirmed by the case of *Bishop* v. *Marsh*. (*d*)

In the case of *Woolley* v. *Cloutman*, (*e*) the court of Queen's Bench,—the chief justice being *Lord Mansfield*,—decided that an action for use and occupation was within the purview of section 6 of 3 Jac. 1, c. 15, the London Small Debts Act, which provides, that "this Act, or any thing therein contained, shall not extend to any debt upon any lease of lands or tenements, or any other real contracts," &c. The 11th section of the 39 & 40 Geo. 3, c. 4, enacts, "that this Act, or any thing herein contained, shall not extend to any debts, where any title of freehold or lease for years, of any lands or tenements, shall come in question," &c. Section 19 provides, that "the two first hereinbefore recited Acts, &c. and all powers, provisions, clauses, matters and things herein expressly contained, shall, so far as the same are not hereby expressly repealed, or otherwise provided for, and are not inconsistent with any of the provisions of the present Act, continue and be in full force," &c. The court of Exchequer, without expressly deciding the question, inclined to the opinion, that an action for use and

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(*a*) *Neale* v. *Ellis*, 12 L. J. q. b. 329.
(*b*) Dougl. 245.
(*c*) Dougl. 263.
(*d*) 8 Dowl. P. C. 1.
(*e*) Dougl. 244.

occupation was not included in section 11 of the 39 & 40 Geo. 3, c. 104, and that a suggestion might be entered on the roll to deprive of his costs a plaintiff in such an action who should recover less than 5*l.* from a person within those sections of the London Court of Requests Acts, which give to certain persons the privilege of being sued therein. (*a*)

The objections to the jurisdiction of courts of requests that have been raised on the ground of alleged non-residence, and the like, are both numerous and ingenious. The 3 Jac. 1, c. 15, the first London Act, enacts, sec. 2, "that every citizen and freeman of the city of London, and every other person and persons inhabiting, or that shall inhabit, within the said city or the liberties thereof, being a tradesman, victualler, or labouring man, which now have, or hereafter shall have any debt or debts owing unto him or them, not amounting to 40*s.*, by any citizen, or by any other person or persons being a victualler, tradesman, or labouring man, inhabiting, or that shall inhabit, within the said city, or the liberties thereof, shall or may cause such debts or debtors," &c. The 14th Geo. 2, c. 10, s. 1, enacts, "that it shall and may be lawful to and for every citizen and freeman of the city of London, and every other person and persons inhabiting, or that shall hereafter inhabit, within the said city or the liberties thereof; and all and every person or persons, who do or shall rent or keep any shop, shed, stall or stand, or seek a livelihood in the said city or liberties thereof, which now have, or hereafter shall have, any debt or debts owing unto him, her, or them, not exceeding the sum of 40*s.*, by any person whatsoever, inhabiting or seeking a livelihood within the said city or liberties thereof, during their respective inhabiting within the said city or liberties thereof, or seeking a livelihood as aforesaid, to cause such debtor or debtors to be warned or summoned," &c. It was held, that under these Acts the court of requests had not jurisdiction, unless both the plaintiff and the defendant were resident within the city. (*b*) The 39 & 40 Geo. 3, c. 114, s. 5, makes an alteration in respect of the plaintiff, by giving the privilege to sue, to persons "whether residing within the city of London or elsewhere;" and describes the parties liable to be sued thus:—"any person or persons wheresoever residing or inhabiting within the city of London, or the liberties thereof, or keeping any house, warehouse, shop, shed, stall or stand, or seeking a livelihood, or trading or dealing within the same city or liberties." The term "seeking a livelihood" therein does not apply to parties who do not reside, unless they seek their living there,

(*a*) *Double* v. *Gibbs*. 1 Dowl. 583. (*b*) *Brooks* v. *Moravia*, 2 H. Bl. 220.

substantially and in some open way; (*a*) the livelihood, moreover, should be the whole of the livelihood; (*b*) and it is doubtful whether service to another is a "seeking a livelihood" that will suffice. (*c*) A coal merchant residing and carrying on business at Lambeth, in Surrey, but keeping a counting-house in the city of London, for the purpose of receiving orders, was held not to be entitled to the privilege of being sued only in the London Court of Requests, as a person seeking his livelihood in the city; for, as the word "counting-house" is not in the Act, to bring him within the statute, London must be the only place in which he seeks his livelihood. (*d*) So parties keeping a counting-house, only for the purpose of receiving orders, in the city of London, and carrying on business at Liverpool also, are not within the purview of the statute. (*e*) A person plying as a porter in the city of London, and resorting to a house of call there, but not lodging in the city, is not a person seeking his livelihood in London. (*f*) A market gardener, who rented a stand with a shed over it in Fleet-market, at an annual rent, which he occupied three times a week on market days, till ten o'clock in the morning, after which, and on all other days, it was occupied by others, did not, it was held, keep a stand within the meaning of the Act, so as to be privileged to be sued there for a debt under 5*l*. (*g*) A clerk in the excise office, attending in the city of London from ten till four every day, Sundays and holidays excepted, and not having any other means of obtaining his livelihood, but residing with his wife and family out of London, is not a person "seeking a livelihood" within the Act, and therefore is liable to be sued in the superior courts for a debt under 5*l*. (*h*) Where a person rented a counting-house in the city of London, jointly with another person, and received orders there for his business, it was held, that he was within the jurisdiction of the Court of Requests for the city of London, though he slept and resided in Southwark. (*i*) An officer of the sheriff of Middlesex kept a lockup-house in that county, where he resided and carried on his business. He also kept an office or counting-house in the city of London, where he carried on the business of a sheriff's officer, in partnership with his son: it was held, that he was a person seeking a livelihood, or trading, or dealing in London. (*j*) The master of a vessel, trading between London and Rotterdam,

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(*a*) *Gould* v. *Colyer*, 1 Smith, 334.
(*b*) *Stephens* v. *Derry*, 1 East, 147. *Meredith* v. *Drew*, 2 M. & S. 116.
(*c*) *Holden* v. *Newman*, 13 East, 161.
(*d*) *Kemsett* v. *West*, 5 D. & R. 626.
(*e*) *Reeves* v. *Stroud*, 1 Dowl. P. C. 399.
(*f*) *Skinner* v. *Davies*, 2 Taunt. 196.
(*g*) *Gray* v. *Cook*, 8 East, 336.
(*h*) *Smith* v. *Hurrell*, 10 B. & C. 542.
(*i*) *Croft* v. *Pitman*, 5 Taunt. 648.
(*j*) *Bushnell* v. *Levi*, 3 Bing, 315.

not having any place of business in the city, but occasionally transacting a little business at the quay where his vessel is moored, and having a place of residence in Southwark, is not a person seeking his livelihood or having dealings or transactions in London, within the meaning of the statute under consideration. (*a*) If a defendant reside or inhabit within London, he is liable to be sued in the London court of requests for debts under 5*l.*; and the plaintiff who sues him elsewhere and recovers less, will not be entitled to costs, though the defendant has another place where he occasionally resides, and the goods be delivered there. (*b*) The test would seem to be, certainty that the defendant will be found within the jurisdiction, in order that he may be summoned. For this, it is evident, he must seek his livelihood or the like *suo jure*, and not be liable to be sued elsewhere; neither must the person who would summon him be liable to trespass, if he should enter the place wherein the livelihood is sought, despite the dissent of a third party; it is also plain, that he must seek his whole livelihood within the jurisdiction. The case of the sheriff's officer is not an exception; for there the officer was the officer of the sheriffs of London, not joint officer with his son; and as the officer of the sheriff of London, he, it would be to be presumed, would be found at his office within the jurisdiction.

But the first Westminster Act, 23 Geo. 2, c. 27, it is enacted, sec. 21, "that no action or suit for any debt, not amounting to the sum of 40*s.*, and recoverable by virtue of this Act in the said court of requests, shall be brought against any person residing or inhabiting within the jurisdiction thereof, in any other court whatsoever." Section 8, however, enacts that the defendant sued for a debt under 40*s.* "may plead generally in bar of such action, that at the time of commencing such action the defendant was inhabitant *and* resident within the said city," &c.; and it was held, that the privilege from being sued elsewhere was given to inhabitants and residents only, not to persons seeking their livelihood in Westminster. (*c*) It is not necessary, in order to give a county court jurisdiction, that the plaintiff should reside within the county, (*d*) but to bring a case within the 23 Geo. 3, c. 33, (the Middlesex County Court Act) the 4th section of which enacts, that "no person or persons shall be liable to be summoned to the said county court, at the suit of any plaintiff or plaintiffs, other than such person or persons as was or were liable to be summoned to the county court of Middlesex before this Act was

(*a*) *Double* v. *Gibbs*, 1 Dowl. P. C. 593.

(*b*) *Rice* v. *Legh*, 2 Dowl. P. C.

(*c*) *Scotts* v. *Seager*, 1 M. & R. 244.

(*d*) *Prichard* v. *Macgill*, 5 Dowl. P. C. 731.

made;" the cause of action must arise in Middlesex, (*a*) for the sheriff could not hold a plea of debt for a cause of action arising out of his county. (*b*) Section 19 enacts "that in case any action of debt or assumpsit is brought in the courts of record at Westminster, and the defendant at the time of action brought shall reside in Middlesex, and be liable to be summoned to the county court, and a verdict is found for less than 40*s*., unless the judge certifies, no costs shall be awarded to the plaintiff, but the defendant shall be entitled to double costs;" the defendant then must reside in the county, and the cause of action arise within the county (*c*) The 23d Geo. 2, c. 27, the first Westminster Act, gives, sect. 6, to certain parties, a right of suing in the court of requests, when debts are owing to them from "persons residing or seeking a livelihood within the said city or liberty:" the statute 23 Geo. 2, c. 23, is intituled "An Act for preventing Delays and Expenses in the Proceedings in the County Court of Middlesex, and for the more speedy recovery of Small Debts in the said County Court;" the 21st section is as follows—"Provided always, and be it enacted, by the authority aforesaid, that nothing in this Act contained shall extend, or be construed to extend, to the city and liberty of Westminster, and the precincts of the same, and so much of the several parishes of St. Clement Danes and St. Mary-le-Strand, in the county of Middlesex, as lies without the city and liberty of Westminster, and also in the precincts of the Savoy, adjoining the same;"—in an action for goods sold and delivered, where the only issue was *non est factum*, raised by the replication to a plea of the release of one joint contractor, pleaded *puis darrein continuance*, a verdict of 194*l*. found for the plaintiffs, was reduced by the court above to 1*s*. The contract was made, and the cause of action arose within the city of Westminster, and not elsewhere, but the defendant, at the commencement of the suit, resided in Middlesex; on an application to enter a suggestion for double costs, it was held that the plaintiffs were not bound to sue in the Middlesex county court, as the cause of action arose in Westminster; and *Rolfe*, B., said:—"Mr. Thesiger reads the proviso in the 21st section of the Middlesex Act, as declaring that this Act shall not extend to causes within the jurisdiction of the Westminster Court of Requests Act—that is, to cases where the parties *reside* in Westminster. But that is not the meaning of the proviso. It must be intended, that the proviso is grafted on the pre-

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(*a*) *Bailey* v. *Chitty*, 5 Dowl. P. C. 307.

(*b*) *Dalton's Sheriff*, c. 110, p. 412. *Welsh* v. *Proyte*, 2 H. Bl. 29.

(*c*) *Wells* v. *Langridge*, 5 Dowl. P. C. 509.

amble, and that the Act relates to all the county of Middlesex except the city of Westminster; and, therefore, where the *cause of action* arises in the city of Westminster, the action ought not to be brought in the county court of Middlesex." (*a*) This case has left still undecided the question, whether the provisions as to costs in Courts of Requests Acts apply to cases where the only issues in the cause are of a collateral nature. To a declaration for goods sold, the defendant pleaded, according to the 23 Geo. 2, c. 27, s. 8, (the Westminster Act,) that the defendant was indebted in a less sum than 40*s*., and that he was an inhabitant, and resident within the city of Westminster. Replication, that the defendant was indebted in the sum of 40*s*. At the trial, the jury found for the defendant. After plea pleaded, the statute 23 Geo. 2, c. 27, was repealed by the 6 & 7 W. 4, c. 86, and the sum of 5*l*. was substituted for the former sum of 40*s*.; but provision was not made for the case of actions then pending. A rule to enter up judgment for the plaintiff, *non obstante veredicto*, was made absolute, *Alderson*, B., saying, "the question is, upon the facts found on this record, what must be the judgment of the court, according to the law now in existance." (*b*)

Under the first Southwark Act, 22 Geo. 2, c. 47, the words of sect. 4, being—"That it shall and may be lawful to and for every resiant and inhabitant of the said town and borough of Southwark, and for all the resiants and inhabitants within the said several parishes of ————————, and to and for all and every person or persons renting or keeping any shop, shed, stall, or stand, or seeking a livelihood within the said town or borough, or within any of the parishes, &c., who now have, or hereafter shall have, any debt or debts owing unto him, her, or them, not exceeding the sum of forty shillings, by any person or persons whatsoever, inhabiting or seeking a livelihood within the said town and borough, or within, &c., to cause such debtor or debtors, so inhabiting or seeking a livelihood, as aforesaid, to be named," &c.; it was held, that both plaintiff and defendant must be resident within the jurisdiction of the court.(*c*) And, if the defendant lodge within the jurisdiction of the court created by this Act, he is within the statute, though he carry on his business, and the goods were delivered out of the jurisdiction, and the plaintiff did not know, until after the process had been sued out, that the defendant did lodge within the jurisdiction. (*d*.) A similar

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(*a*) *Todd* v. *Emly*, 12 L. J. N. C. 374.

(*b*) *Warne* v. *Beresford*, 2 Mee. & W. 848.

(*c*) *Dillamore* v. *Capon*, 1 Bin. 388.

(*d*) *Spencer* v. *Holloway*, 15 East, 647.

decision was pronounced in the Isle of Wight Court of Requests Act, (*a*) and that for Birmingham. (*b*)

These decisions naturally suggest the question of time; for it will be asked, must there have been residence at the time when the cause of action accrued? Will residence at the time of issuing initiative process suffice?—and how will it be in the case of removal and return? Under some statutes, as we have seen, the cause of action must arise within the jurisdiction; for the most part, however, these statutes regard only the fact of residence at the time of the initiative process: to the last question, the following case gives the answer:—

The 18th section of 47 Geo. 3, c. 78, s. 2, which creates a local court for the recovery of small debts in the sokes of Bolingbrooke and Horncastle, and other places in Lincolnshire, gives jurisdiction in cases where the defendant is a person "inhabiting, residing, or being, or keeping, or using a shop, seeking a livelihood, or trading," at any of the places mentioned in the Act: it was held that these words do not include the case of S., who, having kept a shop and carried on the trade of a shoemaker therein at T., one of the places mentioned, had left it, and had gone to L. (which was without the jurisdiction), for the purpose of obtaining the situation of master of the national school there, no *animus revertendi* being alleged, but the shop being shut up and offered to be disposed of, although, after the service of the writ in the present action, he returned to T. and resumed his trade. (*c*)

By the Bath Court of Requests Act, "any person or persons, whether such person or persons shall reside within the jurisdiction of the said court or not, having any debt or debts on the balance of account or otherwise howsoever, not exceeding the value of 10*l*., due or owing, or belonging to him, her, or them," &c., (enumerating several rights in respect of which debts may be due,) "or in any other manner whatsoever, which the said commissioners are by this Act entitled to judge and determine, and not expressly prohibited by this Act, by or from any other person or persons whatsoever, inhabiting, residing, or being within the said city, or liberty, or precinct thereof, or within either of the several parishes, places, hundreds, or liberties as aforesaid, or keeping or using any house, warehouse, wharf, quay, lodging, shop, shed, stall or stand, or using or frequenting the markets there, or seeking a livelihood, or in any way trading or dealing within the same," &c., "may apply," &c. This statute, it has been holden, puts the jurisdiction of the

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(*a*) *Oakes* v. *Albin*, 13 Price, 793.
(*b*) *Lees* v. *Rogers*, 4 Taunt. 150.
(*c*) *Searson* v. *Robinson*, 7 Jur. 1088.

court as to debts not exceeding 10*l.*, entirely on the residence of the defendant. (*a*) A plaintiff then who sues a defendant, resident in Bath, in any other court than the Bath Court of Requests, and recovers less than 10*l.*, may be deprived of his costs by suggestion on the roll, no matter in what part of England he himself may reside, unless the cause of action be excepted from the jurisdiction of the court. (*b*)

It will sometimes happen that a defendant may be brought within the operation of more than one act creating a jurisdiction by means of very ample words: this, of course, only increases the duty of the plaintiff to sue him in one of the local courts. But the case is also to be imagined in which the defendant shall have several places of business, some within the limits to which the jurisdictions of particular acts of parliament extend, and some without those limits: thus, in one instance, the defendant (an attorney) was sued in the superior court for a debt of 7*l.*; he resided and had an office at a place without the jurisdiction of a court of requests; but part of his business was carried on at Bath, and part at Bristol, at each of which places he also occupied offices. Bristol, as well as Bath, has a court of requests, having exclusive jurisdiction to the extent of 10*l.* over all debts, contracted by parties, "inhabiting, residing, or being" within such jurisdiction, or "keeping or using any house, warehouse, wharf, quay, lodging, shop, shed, stall or stand, or using or frequenting there, or seeking a livelihood, or in any way trading or dealing within the same;" and it was held that the defendant was not entitled to claim to be sued in either of these courts. (*c*)

An attorney is not prevented from suing in the superior courts, unless his privilege be taken away by express words, or the necessary construction of the statute, as when the Act contains a clause, prohibiting actions from being brought in other courts for debts recoverable thereby. (*d*) When an attorney is defendant, he is not liable to be sued in a court of requests, unless he be specially subjected to the jurisdiction by some provision of the statute establishing the court.

The application for a writ of prohibition is most frequently made in the court of Queen's Bench; the three superior courts of law at Westminster, however, have a concurrent jurisdiction to issue the writ of prohibition in civil cases, and will exercise it whenever it appears that such interference is called for by some act done in some

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(*a*) *Baildam* v. *Pitter*, 3 B. & A. 210; 1 Chit. 635.

(*b*) *Graham* v. *Burns*, 1 Dowl. P. C. 309.

(*c*) *Meredith* v. *Drew*, 2 M. & Scott, 116.

(*d*) *Dyer* v. *Levy*, 2 Dowl. 630.

cause dependent in an inferior court, either contrary to the general law of the land, or manifestly out of the jurisdiction of such court.(*a*) Excess of jurisdiction, then, or the assumption by an inferior court of power to do an act in a matter not within its cognizance, is the general ground of prohibition; but the practice of an inferior court will not be noticed, neither will an inquiry be entered into as to whether, in some particular case, the practice has been regular.(*b*) Writs of prohibition lie to any court within the Queen's dominions, and are constantly directed to the ecclesiastical courts, the court of Admiralty, the county courts, courts of requests, and inferior courts of every description. When the want of jurisdiction appears upon the face of the proceedings, the application may be granted at any time, either before or after sentence: but, when sentence has been pronounced, then, it was held,(*c*) the prohibition cannot issue, unless upon the face of the proceedings there be a want of jurisdiction. In a subsequent case, however, decided in another court, this doctrine was put forward, and Lord *Abinger*, C. B., said: (*d*)—"The principle of the rule seems to be this, that if you wait and take the chance of a sentence in your favour, you cannot afterwards object to the jurisdiction, unless it appear on the proceedings that the court had no jurisdiction." It was at the same time remarked by *Alderson*, B., that "if the superior courts have jurisdiction to restrain the proceedings of inferior courts, there must of necessity and common sense be some power to restrain the inferior courts from proceeding upon a sentence passed when the superior courts are not sitting, and when no application can be made to them; otherwise they might commit any injustice, however great, and could not be stopped or prevented from doing so." (*e*) The case in question turned on the construction of the Bath Act; it appeared that one Humby was a householder of Bath, and that his name was on the list of persons entitled to vote in the election of members of parliament for the city of Bath; that he had objected to the name of Roberts being retained on the same list of voters, by virtue of the 2 & 3 Will. 4, c. 45; that Roberts attended at their court, before the revising barristers, who disallowed the objection, and retained the name; that Humby was thereafter summoned before the commissioners "to answer a demand against you by William Prowling Roberts, for the sum of 10*s*. for attendance on

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(*a*) Ex parte *Smyth*, 5 Nev. & M. 145. 1 Har. & W. 417.
(*b*) Ibid.
(*c*) *Ricketts* v. *Bodenham*, 4 Ad. & E. 433.
(*d*) *Humby* v. *Roberts*, 3 M. & W. 122.
(*e*) Ibid. p. 123.

the 2nd day of October instant, on your notice at the revising barrister's court," &c.; that after objection to the jurisdiction by Humby, the case was heard: and that finally, Humby was adjudged to pay Roberts "the sum of ten shillings for his debt" and costs. A rule nisi for a prohibition was obtained, against which cause was shown by *Campbell*, A. G., who relied on *Ricketts* v. *Bodenham*, (*a*) and *Poe's case*, (*b*) in support of the position that the application for the writ was too late; and on *Soames* v. *Rawlings*, (*c*) which was a case involving the like point under the Westminster Act, for the jurisdiction of the court. In giving judgment, Lord *Abinger*, C. B., said:—"This case has been very ingeniously argued, but I am of opinion that the rule for a prohibition must be made absolute. In the first place, a comparison was made between this case and the proceedings in *Ricketts* v. *Bodenham*, in the Ecclesiastical Court; but that case is not analogous, as there the Ecclesiastical Court not only had jurisdiction, but it was confined to their jurisdiction. It has no analogy to the case of an inferior court. In inferior courts a jurisdiction must be shown; it will not be presumed, 2 Bac. Ab. Courts, D., 334. Here, upon the face of the proceedings, there is a want of jurisdiction. The summons states no other foundation for a claim of debt than that Roberts attended before the revising barrister, in consequence of a notice that his debt would be disputed. The attendance upon that notice does not constitute a debt. Then does the Act of Parliament extend to this case? It must be construed strictly, as it gives power to a court of inferior jurisdiction. We cannot give to the words of the 16th section—'In all actions or causes of debt, whether such debts shall arise from any bond, bill, or specialty for payment of money only, or any promissory note or inland bill of exchange, or for rent upon leases, articles, minutes; and on all causes of assumpsit and *insimul computasset*, and in all causes or actions of trover and conversion, and in all causes or *returns* founded upon a *quantum meruit*; and in all causes or actions of trespass or detinue for goods and chattels taken or detained'—the sense contended for. I cannot pretend to say what is the meaning of the words in the latter part of the clause as to the *quantum meruit*. It is enough to say, that they cannot be construed into an action of debt for attending before the revising barrister, although the parties be vexatiously taken there. Next, it is said, that by the 47th section their jurisdiction is final, and our power of interference is taken away; but the jurisdiction of the superior courts cannot be taken

(*a*) 4 A. & E. 433.
(*b*) 5 B. & Ad. 681.
(*c*) 2 C. M. & R. 744.

away without express words. That section says, that there shall be no *certiorari;* but that does not apply to cases of prohibition, which is not to remove the cause, but to restrain the inferior court from proceeding." And *Parke*, B., said:—"I entirely agree in opinion with the Lord Chief Baron, that the rule must be absolute, on the ground that, connecting the summons with the sentence, a want of jurisdiction appears. If it had not, I should have wished to consider the question, whether this court could interfere after sentence? In *Buggin* v. *Bennett* (*a*) Lord *Mansfield* says:—'If it appears upon the face of the proceedings, that the court below have no jurisdiction, a prohibition may be issued at any time either before or after sentence; because all is a nullity; it is *coram non judice.* But where it does not appear upon the face of the proceedings, if the defendant will lie by, or suffer that court to go on under an apparent jurisdiction, as upon a contract made at sea, it would be unreasonable that this party who, when defendant below, has thus lain by, and concealed from the court below a collateral matter, should come hither after sentence against him there, and suggest this collateral matter as a cause of prohibition, and obtain a prohibition upon it, after all this acquiescence in the jurisdiction below.' It is put entirely on the ground of acquiescence. If it had been necessary, I should have wished to consider, whether a party is to be bound by the judgment of an inferior court, where he has had no opportunity to dispute its jurisdiction; but here it appears the court had no jurisdiction over a claim of this kind, which is not within either of the classes of actions set forth in the 16th section." The opinion of *Alderson*, B. was delivered in these terms;—"It is quite clear, upon the face of the proceedings, that there was a want of jurisdiction. If it had not, I own I should have thought, under the circumstances of this case, that this court would have a right to interfere. I think a writ of prohibition may be granted even after execution. All the cases where it has been held otherwise will be found to have turned on the acquiescence of the party. In Coke's Inst., title *Articuli Cleri* (*b*), the objection is thus stated:—'As touching the time when prohibitions are granted, it seemeth strange to us that they are not only granted at the suit of the defendant, in the ecclesiastical court, after his answer (whereby he affirmeth the jurisdiction of the said court, and submitteth himself unto the same), but also after all allegations and proofs made on both sides, when the cause is fully instructed and furnished for sentence; yea, after sentence; yea, after two or three

(*a*) 4 Burr. 2037. (*b*) 2 Coke's Inst. 602.

sentences given; and after execution of the said sentence or sentences; and when the party for his long continued disobedience is laid in prison upon the writ of *excommunicato capiendo*.' And then the answer is, 'prohibitions by law are to be granted at any time to restrain a court to intermeddle or execute any thing, which by law they ought not to hold plea of; and they are much mistaken that maintain the contrary.' And again:—'And the king's courts that may award prohibitions, being informed either by the parties themselves, or by any stranger, that any court, temporal or ecclesiastical, will hold plea of that (whereof they have not jurisdiction) may lawfully prohibit the same, as well after judgment and execution as before.'" The rule was made absolute. Thus then, even when the want of jurisdiction does not appear on the face of the proceedings, it should seem settled law that a prohibition will issue to restrain an excess of jurisdiction after judgment, unless the defendant have acquiesced. Whether submission at the time will be considered acquiescence; whether it will only then be considered acquiescence when it has been protracted beyond the time when an opportunity for applying to a superior court first presented itself after judgment; are questions that remain for decision. If, however, we regard the nature of the causes on which some of the courts of requests—this very one of Bath, for instance—have to adjudicate; and reflect that in many Acts—this Bath Act is one of them—there is a clause that prohibits attornies from appearing as advocates therein, even by a penalty of fifty pounds, it is not altogether to be doubted, that the superior courts will feel inclined to carry out the doctrine of Lord Coke when the occasion shall arise. As the law at present is known, and as Acts of Parliament now are constituted, the man who declines the jurisdiction, on grounds which he considers good, has but one course to pursue—to appear and protest against the jurisdiction, and then leave the court. He must not, if he is desirous of succeeding on prohibition, take any part in the proceedings, expressly or by implication; his safe course is, having protested,—for it is his duty to draw the attention of the court to the want of jurisdiction,—to quit the court. (*a*) If there be a want of jurisdiction apparent on the proceedings, he will have redress; if there be a want of jurisdiction in point of fact, and it is not apparent, he at all events will not have acquiesced; and there is the possibility, that an obvious ground of prohibition may appear on the order or judgment, though on the face of the anterior proceedings it may not be to be detected. With reference to the Acts which we

(*a*) *The Queen* v. *Clarke*, 1 N. S. C. 313. 8 J. P. 754.

have been considering, it is highly probable that prohibitions will chiefly be moved for to restrain the execution of orders made under the 7 & 8 Vict. c. 96, s. 59, and the 8 & 9 Vict. c. 127, s. 1. It becomes material, then, to ascertain the principles on which the superior courts will interfere by prohibition, when the defect of jurisdiction is manifested, not on the original proceedings, but on a judgment, sentence, or order. There are two cases conceivable: the one, that of obvious excess of jurisdiction, as if, under the former, the order should be for taking and detaining in custody in some manner different from that used before the passing of the Act, or for more than six months, when before the act the term of six months could not be exceeded; the other, that of excess, arising on a construction of law. With respect to the latter, the case of *Evans* v. *Gwyn*, clerk, (*a*) is the most recent and the weightiest authority. It appeared that Mr. Gwyn had instituted proceedings for defamation and slander in the Consistory Court of St. David's, at Carmarthen, against a person of the name of Mary Evans, which resulted in a sentence adverse to the defendant. She then applied for a writ of prohibition, and after some deliberation on the part of the learned judge to whom the application was made, she was directed to declare in prohibition. The declaration set out the libel in the cause, and stated that the defendant below charged the plaintiff below (a clergyman,) with intoxication and indecency, in the Welch language, which words translated into English, in their ordinary interpretation, had the following sense and meaning:—"What time did your master (the plaintiff below) come home last night—was he sober?" "The blackguard was drunk; he must have been: he, on the night before, on his way from Carmarthen, overtook me on the high road, and attempted to throw me over my horse into the ditch; also, put his hand under my safeguard, and then shoved it up under my petticoat until it reached my knee; I struck him with my whip, and galloped off;" or words of the like term or effect—meaning by such words (amongst other things) that on the said occasion the plaintiff below was not sober, and that he wanted to violate the person of her the defendant below; or that he otherwise conducted, or wanted to conduct himself indecently or incontinently towards her. The declaration then set out the sentence, which, after some introductory matter, proceeded thus:—"Forasmuch as by the acts enacted, deduced, alleged, exhibited, propounded, proved and confessed by this cause, I have found, and it doth evidently appear unto

(*a*) 13 L. J. q. b. 222.

me, that the proctor for the said Rev. T. B. Gwyn hath fully and sufficiently proved his intention, deduced in a certain libel, and other pleadings, given or exhibited and admitted, and that nothing, at least nothing effectual, &c. hath on the part and behalf of the said Mary Evans been excepted, deduced, exhibited, propounded, proved or confessed in the cause, which may or ought in anywise to defeat or weaken the intention of the Rev. T. B. Gwyn; therefore I, &c., (the judge aforesaid,) do pronounce, decree and declare, that the said Mary Evans did in the year, month, and place in the said libel mentioned, or some or one of them, publicly and maliciously, in an angry, reproachful, and insidious manner, defame the said Rev. T. B. Gwyn, and maliciously say, publish, and report several scandalous, reproachful, and defamatory words in the same libel mentioned, and tending to the infamy and diminution of the estate, good name, fame, and reputation of him, the said Rev. T. B. Gwyn. Wherefore, I pronounce, decree, and declare, that she, the said Mary Evans, ought to be duly admonished, and I do hereby admonish her for so great excess and rashness in the premises, and do enjoin her under the pain and punishment provided by the criminal law of the realm, that she abstain, &c. And I also pronounce, decree, and declare, that the said Mary Evans ought to be, and I do condemn her in lawful costs, to be paid by her, &c. to the Rev. T. B. Gwyn, or to his proctor in his behalf." Signed by the surrogate. The declaration then averred that the Consistory court had not jurisdiction to make or enforce the decree, &c., and concluded with a prayer for a writ of prohibition. To this declaration there was a general demurrer. In giving judgment, Lord *Denman*, C. J., said, after reading the defamatory words:—"In the first part of them the word 'blackguard' occurs, and there is an imputation of drunkenness, which are matters of spiritual cognizance; but the latter words are by far the most serious, and impute an attempt to violate Mary Evans; and clearly allege an assault committed. These are matters of temporal cognizance, and are not *primâ facie* the subject of proceedings in the Court Christian. In *Fitzherbert's* Nat. Brev. 53, D., it is stated, '(*note*) and all the justices are against a consultation, in a cause of defamation; because it seems he may have his action at common law for the same defamations.' And in *Com. Dig.* 'Prohibition,' G. 4, many authorities are cited to the same effect; and amongst them, the following: 'if a libel be for words which are actionable, a prohibition goes:' and again, quoting Siderfin—'if part of the words be actionable, a prohibition goes for the whole, though the other charge a spiritual crime, as if he says "you are a whore and a

thief."' Taking this, therefore, as the usual rule, it is clear that this suit below might have been prohibited at first. Can it then be prohibited after sentence? This depends upon whether the plaintiff in this suit made it appear that the sentence which was given in the court below was passed in respect of all the defamatory words and charges: and that is the principal difficulty. (His lordship read the sentence). It is contended for the defendant, that the sentence did not pass in respect of all the libels, as the sentence states that the defendant did 'maliciously say, publish, and repeat *several* scandalous, reproachful, and defamatory words in the same libel mentioned;' and that the use of the words 'several,' necessarily excludes some part. We are to say, looking at the whole, whether it does, in truth, exclude some part. If it does, then, upon the authority of *Hart* v. *Marsh*, (*a*) the court is called upon to apply the sentence to that part only of the charge which the court below had jurisdiction to entertain. But I am of opinion that the word 'several' has not the force contended for, and that there being no distinction made in the sentence as to what it applies to, it would be improper for us to say that any part is excluded. The sentence is not that 'several of the words were published' &c., or that they were published 'for the most part;' nor is any such limit given. I am, therefore, of opinion, that the sentence proceeded upon the whole libel, and so includes a sentence in respect of some matters over which the Court Christian had no jurisdiction: and therefore, being clearly applicable to the whole, there is good ground for a prohibition, and judgment must be given for the plaintiff." Of this opinion were the other judges; and *Wightman* J., lays down the rule shortly thus:—"A prohibition will go, if sentence is given generally, in respect of words, of which some are cognizable in the temporal courts, and some in the spiritual: for which an anonymous case, 3 *Mod.* 74, is an authority." The doctrine laid down in the case of *Hart* v. *Marsh*, (*b*) was this—that where some articles in a libel are within the jurisdiction of the Ecclesiastical Court, and some are not, the court will not allow the writ of prohibition to go after sentence, unless it clearly appear by the sentence, that the sentence has proceeded on those articles which are cognizable by the temporal courts. The doctrine in the case of *Evans* v. *Gwyn* seems to be the opposite of that in *Hart* v. *Marsh*, this, namely:—that where some articles in the libel are within the jurisdiction of the Court Christian, and some are not, the court will allow the writ of prohibition to go, unless it appear that the sentence have

(*a*) 4 Dowl. P. C. 424. (*b*) 4 Dowl. P. C. 424.

proceeded on those not cognizable by the common law courts, that is, exclusively cognizable by the spiritual court. This is consistent with the judgment of the House of Lords in the recent case of *O'Connell and others* v. *The Queen*. If we apply this doctrine to the cases that may possibly arise under the 7 & 8 Vict. c. 96, or the 8 & 9 Vict. c. 127, it will be easy to ascertain whether or not prohibition will lie after order made. The writ of prohibition issues as a matter of right if legal grounds be laid for its issuing; and it issues at any time, if it shall appear that the court below is *de facto* proceeding, or that there is ground to apprehend that it is about to proceed, in a matter beyond its jurisdiction, or according to a course in violation of the common law; therefore, it would appear after execution: but if the order be for execution against the person, the proceeding by *habeas corpus* will be most convenient.

In the case of *Roberts* v. *Humby*, we have seen the court take notice of a defect apparent on the face of the summons, and from that case we learn under what circumstances it will take notice of a want of jurisdiction not disclosed on the face of the proceeding. But when the summons contains a ground of action indistinctly stated, of which it is doubtful whether or not it falls within the jurisdiction of the local tribunal, the superior court will not interfere. In the case of *Ex parte Taylor*, (*a*) it appeared that a lady named Rose had employed an attorney of the name of Taylor to conduct certain proceedings for her; and that owing to his negligence, as she alleged, she was compelled to pay the sum of 2*l*. 12*s*. 6*d*. She then commenced proceedings against him in the Manchester court of requests, from the jurisdiction of which attornies are not exempt; and the cause of action was thus set forth in the summons: "for goods sold; money paid in consequence of neglect." The words "goods sold" were part of a printed form, and, by inadvertence, had not been struck out. The 21st section of the local act, 48 Geo. 4, c. 43, enacts, "That it shall be lawful for the said commissioners, and they are hereby enabled to decide and determine all disputes and differences between party and party for any sum not exceeding five pounds, in all actions or causes of debt, whether such debt shall arise from any bond, bill, or specialty for payment of money only, or any promissory note, or inland bill of exchange, or rent upon lease, articles, or minutes, and in all causes of *assumpsit* and *insimul computasset*, and in all causes or actions of trover and conversion, and in all causes, or returns founded on a *quantum meruit*, and in all causes

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(*a*) 8 Justice of the Peace, 41.

or actions of trespass, or detinue for goods or chattels taken or detained." Mr. Taylor appeared before the commissioners and denied their jurisdiction over the subject matter of the complaint, as disclosed by the summons: the commissioners overruled the objection; he then quitted the court, and applied for the writ, which, after argument, was refused: Lord *Denman*, C. J., saying:—"It seems to me that the notice is too equivocal to admit of our saying that this is not a cause of action on which assumpsit will lie; here is the word 'neglect:' what does that mean?—it may mean that the money has not been paid over. The rule must be discharged." And *Coleridge*, J. said:—"Goods sold, and money paid in consequence of neglect? Neglect may be made the foundation of an action of assumpsit: we cannot say that the neglect here complained of is not such. I agree therefore that the rule must be discharged."

In conclusion, it is necessary to observe, that Courts of Requests Acts are within the 5 & 6 Vict. c. 97, which limits to two years, or, in case of continuing damage, to one year after damage ceasing, the period within which actions may be brought for anything done in pursuance of any public local or personal act. (*a*)

(*a*) *Cock* v. *Gent*, 3 Dowl. N. S. 413.

APPENDIX.

GENERAL STATUTES RELATING TO COURTS OF REQUESTS.

27 GEO. II. c. 16.

An Act for making perpetual several Laws for Punishment of Persons destroying Turnpikes, Locks or other Works erected by Authority of Parliament; and that all Acts made for erecting Courts of Conscience shall be deemed publick Acts; and to impower a certain number of the Trustees of the *British Museum* to do certain Acts; and for confirming the Table of Fees to be taken by the Clerks to the Justices of the Peace for the County of *Middlesex*; and for giving further Time for the Payment of Duties omitted to be paid for the Indentures or Contracts of Clerks and Apprentices; and for filing Affidavits of the Execution of Contracts of Clerks to Attornies and Solicitors; and for preventing Persons driving certain Carriages from riding upon such Cariages.

All Acts for erecting courts of conscience for recovery of small debts to be deemed publick Acts.

Sect. II. "And whereas many inconveniences have arisen by reason several Acts for erecting courts of requests or conscience in several cities, towns corporate, and other places, have not been declared to be publick Acts;" be it therefore enacted, That from and after the first day of *January*, one thousand seven hundred and fifty-five, all the Acts of Parliament for erecting courts of requests or conscience for the recovery of small debts in cities, towns corporate, and other places in this kingdom, shall be deemed, adjudged, and taken, to be publick Acts, and shall be judicially taken notice of as such by all judges, justices, and other persons whatsoever, without specially pleading the same.

26 GEO. III. c. 38.

An Act for regulating the Time of the Imprisonment of Debtors imprisoned by Process from Courts instituted for the Recovery of Small Debts, for abo-

lishing the Claim of Fees of Gaolers and others in the cases of such Imprisonment, and for ascertaining the Qualifications of the Commissioners.

26 Geo. 3, c. 38.

Whereas by several Acts of Parliament now in force and made to establish or regulate courts for the recovery of small debts in several cities, towns, districts and places within this kingdom, there is no uniform time limited for the duration of the imprisonment of the defendant or debtor against whom an execution, process of contempt or precept in the nature of an execution, is issued for non-payment of such debts and costs, sum or sums of money as by the order or orders of such courts such debtor or defendant is ordered or directed to pay, but such debtors or defendants are by such Acts of Parliament to be committed to prison, there to remain for an indefinite length of time, until he, she, or they shall perform the order of the court or commissioners in that behalf; so that it frequently happens that a poor person who is not of ability to pay a debt of or under forty shillings is imprisoned for many months, and sometimes for years, without a possibility of being discharged: And whereas it often happens that poor persons who are committed to prison by virtue of and in pursuance of the said Acts of Parliament for a trifling debt, are kept in custody after they have been enabled to pay and discharge such debt, for gaol fees: And whereas an Act was made in the last session of Parliament, intituled *An Act for reducing the Time for the Imprisonment of Debtors committed to Prison, upon Prosecutions in Courts of Conscience in* London, Middlesex, *and the Borough of* Southwark, *to the same Periods in each Court; and for abolishing Fees paid by those Debtors to Gaolers or others on account of such Imprisonment*, the purposes of which Act have been found to be beneficial: and it is expedient that the like provisions should be extended to all other courts instituted for the recovery of small debts; Therefore be it enacted, by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, That from and after the first day of *September*, one thousand seven hundred and eighty-six, no person whosoever, being a debtor or defendant, and who has been or shall be committed to any gaol or prison by order of any court or commissioners authorized by any Act or Acts of Parliament for constituting or regulating any court or courts for the recovery of small debts, where the debt does not exceed twenty shillings, shall be kept or continued in custody on any pretence whatsoever more than twenty days from the commencement of this Act, or from the time of

25 Geo. 3, c. 45.

Limitation of the time of imprisonment of debtors committed by courts of conscience.

his, her, or their commitment to prison; and where the original debt does not amount to or exceed the sum of forty shillings, more than forty days from the commencement of this Act, or from the time of his, her, or their commitment as aforesaid; and all gaolers, keepers, or turnkeys, are hereby directed and required to discharge such persons accordingly.

Debtors found guilty of a fraudulent concealment of their effects, may be imprisoned for a longer term.

II. And, in order the more effectually to prevent persons summoned for debts to the said courts from the fraudulent concealment of their money or goods, be it enacted by the authority aforesaid, That in case, upon the summons of any person for debt before the said court or commissioners, information of any such practice shall be given, such court or commissioners shall have power to hear evidence as to such fraudulent concealment; and in case it shall be proved to their satisfaction, upon the oaths of two or more credible witnesses, (which oath the said court or commissioners are hereby empowered to administer, and which oath, if falsely taken, shall subject the party or parties so taking it to all the pains and penalties of wilful and corrupt perjury,) that any such debtor has money or goods which he has wilfully and fraudulently concealed: in that case, the court or commissioners shall have power to enlarge the aforesaid times of imprisonment for debts under twenty shillings, to any time not exceeding thirty days, and for debts under forty shillings, to any time not exceeding sixty days, which said circumstance or ground of further detention shall be specified in the said commitment; and the depositions of the witnesses shall be entered in a book to be kept for that purpose by the clerk to each respective court or commissioners.

Debtors not liable to pay gaol fees.

Penalty on gaolers demanding such fees.

III. And be it further enacted by the authority aforesaid, That at the expiration of the said respective times of imprisonment as aforesaid, every such person or persons shall immediately be discharged and set at liberty, without paying any sum or sums of money, fee or fees, or other reward or gratuity whatsoever to the gaoler, keeper, or turnkey of such gaol or prison, or others, by way of gaol fees, or discharge fees, or otherwise, on any pretence whatsoever; and every gaoler, keeper, or turnkey of any such gaol or prison, or others, demanding, taking, or receiving any fee or fees, sum or sums of money whatsoever, upon the discharge of any such person or persons committed or to be committed to his custody as aforesaid, or keeping or detaining any such person or persons, prisoner or prisoners, after the respective times limited by this Act, shall, for every such offence, forfeit and pay the sum of five pounds.

Two justices may deter-

IV. And be it further enacted by the authority aforesaid, that it shall and may be lawful to and for any two justices

mine offences against this Act.

of the peace where the offence shall be committed, to hear and determine any offence against this Act; which said two justices of the peace are hereby authorized and required, upon any information exhibited or complaint made before them of such offence having been committed, to summon the party accused, and also the witnesses on either side, and to examine into the matter of fact; and upon due proof made thereof, by the oath of one or more credible witness or witnesses, or by the voluntary confession of the party, to give judgment or sentence for the penalty or forfeiture, as in and by this Act is directed, and to award and issue out their warrant under their hands and seals, for levying the said penalty of five pounds so adjudged on the goods of the offender, and to cause sale to be made thereof, in case they shall not be redeemed in four days, rendering to the party the overplus (if any): and where the goods of such offender cannot be found sufficient to answer the penalty, to commit such offender to prison, there to remain for the space of two months, unless such penalty shall be sooner paid and satisfied.

Penalties and forfeitures how to be applied.

V. And be it further enacted, That all forfeitures and penalties inflicted by this Act (the necessary charges for the recovery thereof being first deducted) shall be divided and distributed in manner following; that is to say, one moiety thereof to be paid to the churchwardens or overseers of the poor, for the support and maintenance of the poor of the parish in which the offence shall be committed; and the other moiety to the person or persons who shall inform and sue for the same.

Information to be exhibited within a limited time.

VI. Provided always, and be it enacted, That no person or persons shall be liable to be convicted before any justices of the peace, for any offence committed against this Act, unless complaint or information shall be made or exhibited against such person or persons within two calendar months after such offence committed.

Process not to issue against the body and goods of the same person.

VII. Provided also, and be it enacted, That it shall not be lawful for any such court or commissioners to issue any process against the body or bodies of any person or persons, where the party intitled to the benefit of any order, judgment, or decree, shall at the same time have obtained any warrant or process against the goods and chattels of the same person or persons.

Qualification of commissioners.

VIII. And be it further enacted, That, from and after the twenty-fourth day of *June*, one thousand seven hundred and eighty-six, no person shall be capable of acting as a commissioner in the execution of any of the Acts for constituting such courts, unless such person shall be a householder within the county, district, city, liberty, or place, for which he shall act, and shall be possessed of a real estate

of the annual value of twenty pounds, or of a personal estate of the value of five hundred pounds: and if any person, not being so qualified, shall presume to act as a commissioner in the execution of any of the Acts for constituting such courts, every person so acting shall forfeit and pay the sum of twenty pounds to any person or persons who shall sue for the same, to be recovered, with full costs of suit, by action of debt or on the case, wherein no essoin, protection, privilege, or wager of law, or more than one imparlance, shall be allowed; and the person so prosecuted shall prove that he is qualified as aforesaid, or otherwise shall pay the said penalty, upon proof being given of his having acted as a commissioner in the execution of any of the Acts constituting such courts: provided always, that such action or suit shall be commenced within six calendar months next after the offence committed, and shall be laid or brought in the county, city, or place, where the offence shall be committed, and not elsewhere.

Penalty on acting not being qualified.

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7 & 8 VICT. c. 96.

An Act to amend the Law of Insolvency, Bankruptcy, and Execution. [9th *August*, 1844.]

I. Whereas it is expedient to amend an Act passed in the sixth year of the reign of Her present Majesty, intituled *An Act for the Relief of Insolvent Debtors:* be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, That a petition for protection from process under the said Act may be presented to any court or district court of bankruptcy within the district of which the petitioner shall have resided twelve calendar months, without any notice whatever being given to any creditor, or in the *London Gazette*, or any newspaper.

5 & 6 Vict. c. 116.

Petition for protection from process may be presented to any court of bankruptcy without any notice given.

II. And be it enacted, That every petition for protection from process presented after the commencement of this Act to the court of bankruptcy, or to any district court of bankruptcy, shall be in the form specified in the schedule hereunto annexed (A. No. 1): and such petition, and the schedule required by the said recited Act to be annexed thereto, shall be verified by an affidavit of the petitioner in the form specified in the schedule hereunto annexed (A. No. 2); and such affidavit shall be sworn in like manner as affidavits in matters of bankruptcy may be sworn by any law now in force relating to bankrupts, and shall be

Form of petition.

Petition and schedule to be verified by affidavit in the form specified.

annexed to such petition at the time of filing the same; and if such petition and affidavit shall not be in the form herein prescribed, such petition shall be dismissed.

Forthwith after filing of petition a notice to be given to creditors and advertised in the Gazette, &c., and a public sitting of the court appointed for first examination of petitioner and choice of creditors' assignee.

III. And be it enacted, That the commissioner authorized to act in the matter of such petition shall forthwith, after such petition shall have been filed, cause notice of the filing of such petition to be given, in such manner as the commissioner shall direct, to the creditors named in the schedule of the petitioner, and resident within the United Kingdom, and whose debts respectively shall amount to the sum of five pounds, and to be inserted in the *London Gazette* and in some newspaper or newspapers circulating within the county wherein the petitioner shall reside, and shall thereby appoint a public sitting of the court whenever the commissioner shall think fit for the first examination of the petitioner; and the commissioner may adjourn such sitting from time to time, and allow the petitioner to amend his schedule and correct any mis-statement therein, at the discretion of the commissioner, and the choice of the creditors' assignee shall take place at such sitting, or any adjournment thereof, and shall be made by the majority in number and value of the creditors who may attend, by themselves or their attornies duly authorized by letters of attorney in that behalf, before the commissioner on such day; provided that the commissioner shall have power to reject any person so chosen who shall appear to him unfit to be such assignee as aforesaid, or to remove any assignee; and upon such rejection or removal a new choice of another assignee shall be made in like manner.

Commissioner may reject or remove the person so chosen.

Property of petitioner to vest in assignees for the time by virtue of the appointment.

IV. And be it enacted, That the property of the petitioner shall, for the purposes of the said recited Act and of this Act, vest in the assignee or assignees for the time being, by virtue of the appointment of such assignee or assignees; and every such assignee shall be deemed to be an officer of the court in which the petition shall be filed, and shall be liable as such to the control thereof: provided always, that the property of the petitioner shall in every case be possessed and received by the official assignee alone, save where it shall be otherwise directed by the commissioner: provided also, that it shall be lawful for the lord chancellor, or the judges and commissioners of the court of Bankruptcy in *London*, or the majority of them, if authorized so to do by the lord chancellor, from time to time to make such orders, rules, and regulations for the security of the property of the petitioner as he or they may judge reasonable and proper.

Upon petition being filed, commissioner to

V. And be it enacted, That upon such petition being filed the commissioner shall possess the like power and authority touching the seizure of the property of such pe-

titioner (except as herein otherwise directed), and also to compel the attendance of and to examine such petitioner and his wife, and every person known or suspected to have any of the property of such petitioner in his possession, or who is supposed to be indebted to such petitioner, and every person whom the commissioner believes capable of giving any information concerning the person, trade, business, or calling, dealings, or property of such petitioner, or any information material to the full disclosure of the dealings of such petitioner, and to enforce both obedience to such examination, and the production of books, deeds, papers, writings, and other documents, as by any law now in force relating to bankrupts are possessed by the several courts authorized to act in the prosecution of fiats in bankruptcy touching the seizure of property and the examination of any bankrupt or other person under a fiat in bankruptcy.

have the like power for seizure of the property of the petitioner, and the examination of him and other persons, as in bankruptcy.

VI. And be it declared and enacted, That any prisoner in execution upon any judgment obtained in any action for the recovery of any debt, either not being a trader within the meaning of the statutes relating to bankrupts, or being a trader within the meaning of the said statutes owing debts amounting on the whole to less than three hundred pounds, may be a petitioner for protection from process; and every such petitioner to whom an interim order for protection shall have been given shall not only be protected from process, as provided by the said recited Act, but also from being detained in prison in execution upon any judgment obtained in any action for the recovery of any debt mentioned in his schedule; and if any such petitioner, being a prisoner in execution, shall be detained in prison in execution upon any such judgment, it shall be lawful for the commissioner to order any officer who shall have such petitioner in custody by virtue of such execution to discharge such petitioner out of custody as to such execution, without exacting any fee, and such officer shall hereby be indemnified for so doing; and no sheriff, gaoler, or other person whatsoever shall be liable to any action as for the escape of any such prisoner by reason of such his discharge; and such petitioner so discharged shall be protected by his interim order from all process for such time as the commissioner shall by such interim order or any renewal thereof think fit to appoint, until the making of the final order for protection, in the same manner as if such petitioner had not been a prisoner in execution: Provided always, that after the time allowed by any such interim order or any renewal thereof (as the case may be) shall have elapsed, such petitioner shall not by such discharge be protected from being again taken in execution upon such judgment,

Any prisoner in execution upon judgment in an action for debt, not being a trader, or being a trader whose debts are less than 300*l.*, may by petition be protected from process and from being detained in prison for any debt mentioned in his schedule; and if so detained, commissioner may order his discharge.

but such judgment shall remain in full force and effect notwithstanding such discharge.

If petitioner be in custody, and is not entitled to be discharged, he may be brought up by warrant.

VII. And be it enacted, That whenever any such petitioner is a prisoner under any process, attachment, execution, commitment, or sentence, and is not entitled to his discharge in manner aforesaid, the commissioner may, by warrant under his hand directed to the person in whose custody such petitioner is confined, cause such petitioner to be brought before him for examination at any sitting of the court, either public or private, and the expense of bringing such petitioner shall be paid out of his estate, and such person shall be indemnified by the warrant of the commissioner for bringing up such petitioner.

In case of death of petitioner.

VIII. And be it enacted, That if any petitioner for protection from process shall die after the filing of his petition, the commissioner may proceed in the matter of such petition, for the discovery and distribution of his property, as he might have done if the petitioner were living.

Wearing apparel, bedding, working tools, &c., of the value of 20*l.* excepted from the operation of the Act.

IX. And be it enacted, That the wearing apparel, bedding, and other necessaries of the petitioner and his family, and the working tools and implements of the petitioner, not exceeding in the whole the value of twenty pounds, may be excepted by the petitioner in his petition, from the operation of the said recited Act, and of this Act, and in such case shall be altogether excluded from the operation of the said Acts: Provided always, that such excepted articles, with the values thereof respectively, to be ascertained and appraised, if the commissioner shall think fit, in such manner as he shall direct, be fully and truly described by the petitioner in his schedule, but otherwise the exception thereof shall be of no force as to any part of the same.

Official assignee may act until creditors' assignee appointed; may sell the property if commissioner so order, and make allowance to petitioner for his support. Property vested in official assignee to go to his successor.

X. And be it enacted, That until an assignee shall be chosen by the creditors of any petitioner for protection from process, the official assignee nominated by the commissioner upon the filing of the petition of such petitioner shall be enabled to act, and shall be deemed to be, to all intents and purposes, a sole assignee of the property of such petitioner, and, if the commissioner shall so order, may sell or otherwise dispose of such property, or any part thereof, and make such allowance out of the property of such petitioner for the support of himself and his family as the commissioner shall direct; and the property invested in any official assignee alone, or jointly with any assignee chosen by creditors under the said recited Act, this Act, or either of them, shall not remain in such official assignee alone, or jointly with such assignee chosen by creditors, if such official assignee shall resign or be removed from his office, nor

in the heirs, executors, or administrators of such official assignee, nor in the surviving assignee alone, in case of the death of such official assignee, but all such property shall in every such case go to and be vested in the successor in office of such official assignee alone, or jointly with the assignee chosen by the creditors (if any), as the case may be; and whenever any such petition shall have been or shall be dismissed, all sales and dispositions of property, and payments duly made, and all other acts theretofore done by any assignee, or any person or persons acting under his authority, or by any messenger or other person under the authority of the commissioner, according to the provisions of the said recited Act and of this Act or either of them, shall be good and valid, but the property of the petitioner shall otherwise in such case revest in such petitioner; provided, however, that no action or suit shall be prosecuted or commenced against such assignee, messenger, or other person or persons acting as aforesaid, except to recover any property of such petitioner detained after an order made by the commissioner for the delivery thereof, and demand made thereupon.

If petition dismissed, all acts theretofore done according to the Act to be good and valid.

XI. And be it enacted, That all powers vested in any petitioner for protection from process, whose estate shall, under the provisions of the said recited Act, of this Act, or of either of them, have been vested in an assignee or assignees, which such petitioner might legally execute for his own benefit, (except the right of nomination to any vacant ecclesiastical benefice,) shall be hereby vested in such assignee or assignees, to be by such assignee or assignees executed for the benefit of the creditors of such petitioner under this Act, in such manner as such petitioner might have executed the same.

Assignees may execute powers which the petitioner might have executed for his own benefit.

XII. And be it enacted, That in all cases in which any such petitioner shall be entitled to any lease or agreement for a lease, and his assignee or assignees shall accept the same, and the benefit thereof, as part of such petitioner's property, and the said petitioner shall not be liable to pay any rent accruing after the filing of his petition, nor be in any manner sued after such acceptance, in respect of any subsequent non-observance or non-performance of the conditions, covenants, or agreements therein contained: provided that in all such cases as aforesaid it shall be lawful for the lessor or person agreeing to make such lease, his heirs, executors, administrators, or assigns, if the said assignee or assignees shall decline, upon his or their being required so to do, to determine whether he or they will or will not accept such lease or agreement for a lease, to apply to the commissioner, praying that he or they may either so accept the same, or deliver up such lease or agree-

Where lease accepted by assignees, the petitioner not liable for the rent.

Assignees not determining whether to accept the lease, the lessor may apply to the court.

ment for a lease, and the possession of the premises demised or intended to be demised; and the commissioner shall thereupon make such order as in all the circumstances of the case shall seem meet and just, and such order shall be binding on all parties.

Assignees may sue in their own names;

XIII. And be it enacted, That it shall be lawful for the assignee or assignees of any such petitioner, and such assignee or assignees shall be hereby empowered, to sue, from time to time as there may be occasion, in his or their own name or names, for the recovery, obtaining and enforcing of any property or rights of such petitioner, but in trust for the benefit of the creditors of such petitioner, according to the provisions of the said recited Act and this Act, and to give such discharge and discharges to any person or persons who shall be respectively indebted to such petitioner as may be requisite; and to make compositions with any debtors or accountants to such petitioner, where the same shall appear necessary, and to take such reasonable part of any such debts as can upon such composition be gotten in full discharge of such debts and accounts; and to submit to arbitration any difference or dispute between such assignee or assignees and any person or persons for or on account or by reason of any matter, cause, or thing relating to the property of such petitioner; Provided, nevertheless, that no such composition or submission to arbitration shall be made, nor any suit in equity be commenced, by any such assignee or assignees, without the consent in writing of the major part in value of the creditors of such petitioner, who shall meet together pursuant to a notice of such meeting, to be published at least fourteen days before such meeting in the *London Gazette*, and also in some newspaper usually circulated in the neighbourhood of the place where such petitioner had his last usual residence before the filing of his petition, nor without the approbation of the commissioner.

may make composition for debts;

may submit differences to arbitration.

Proviso for consent of creditors to compositions and arbitrations.

Creditors to vote according to balance due to them on an account fairly stated.

XIV. And be it enacted, That in all matters wherein creditors shall vote, or wherein the assent or dissent of creditors shall be exercised in pursuance of or in carrying into effect the said recited Act or this Act, every creditor shall be accounted such in respect of such amount only as upon an account fairly stated between the parties, after allowing the value of mortgaged property, and other such available securities and liens, shall appear to be the balance due; and that all disputes arising in such matters concerning any such amount shall, upon application duly made in that behalf, be examined into by the commissioner, who shall have power to determine the same, and, if it seem fit, to refer the examination thereof to an officer of the said court: Provided always, that the amount in respect of

which any such creditor shall vote in any such matter shall not be conclusive of the amount of his or her debt for any ulterior purposes, in pursuance of the provisions of this Act.

Where the petitioner is beneficially entitled to stock, the commissioner may order a transfer.

XV. And be it enacted, That if any such petitioner shall at the time of filing his petition, or at any time before such petitioner shall become entitled to his final order according to this Act, have any government stocks, funds, or annuities, or any of the stock or shares of or in any public company, either in *England*, *Scotland*, or *Ireland*, standing in his own name in his own right, it shall be lawful for the commissioner, whenever he shall deem fit so to do, to order all persons whose act or consent is thereto necessary to transfer the same into the name of such assignee or assignees as aforesaid; and all such persons whose act or consent is so necessary as aforesaid shall be hereby indemnified for all things done or permitted pursuant to such order.

Suits not to be abated by the death or removal of assignees.

XVI. And be it enacted, That whenever any assignee shall die, resign, or be removed, or a new assignee shall be duly appointed, no action at law or suit in equity shall be thereby abated, but the court in which any action or suit is depending may, upon the suggestion of such death, resignation, or removal, and new appointment, (if any,) allow the name or names of the surviving or new assignee to be substituted in the place of the former, and such action or suit shall be prosecuted in the name or names of the said surviving or new assignee, in the same manner as if he had originally commenced the same.

Goods in possession, order, or disposition of petitioner, whereof he was reputed owner, to be deemed his property.

XVII. And be it enacted, That if any petitioner for protection from process shall, at the time of filing his petition, by the consent and permission of the true owner thereof, have in his possession, order, or disposition any goods or chattels whereof such petitioner was reputed owner, or whereof he had taken upon him the sale, alteration, or disposition as owner, the same shall be deemed to be the property of such petitioner, so as to become vested in the assignee or assignees for the time being of the estate and effects of such petitioner; provided that no transfer or assignment of any ship or vessel, or any share thereof, made as a security for any debt or debts, either by way of mortgage or assignment, duly registered according to the provisions of an Act made in the session of Parliament held in the third and fourth years of the reign of his late Majesty King *William* the Fourth, intituled *An Act for the registering of British Vessels*, shall be invalidated or affected by reason of such possession, order, or disposition of the same as aforesaid.

3 & 4 W. 4, c. 55.

Distress not to be available for more than one year's rent.

XVIII. And be it enacted, That no distress for rent made and levied, after the filing of any petition for protection from process, upon the goods or effects of the petitioner, shall be available for more than one year's rent accrued prior to the filing of such petition, but that the landlord or party to whom the rent shall be due shall and may be a creditor for the overplus of the rent due, and for which the distress shall not be available, and entitled to all the provisions made for creditors by the said recited Act or by this Act.

Voluntary preference fraudulent and void as against assignees.

XIX. And be it enacted, That if the petitioner shall, before or after the filing of his petition, in contemplation of his becoming insolvent, or being in insolvent circumstances, voluntarily convey, assign, transfer, charge, deliver, or make over any estate, real or personal, security for money, bond, bill, note, money, goods, or effects whatsoever, to any creditor or creditors, or to any person or persons in trust for, or to or for the use, benefit, or advantage of any creditor or creditors, or to any person who is or may be liable as surety for such petitioner, every such conveyance, assignment, transfer, charge, delivery, and making over, shall be deemed fraudulent and void as against any assignee or assignees of the estate and effects of such petitioner appointed under the provisions of the said recited Act and of this Act, or of either of them: Provided always, that no such conveyance, assignment, transfer, charge, delivery, or making over shall be so deemed fraudulent and void if made at any time prior to three months before the filing of the petition, and not with the view or intention, by the party so conveying, assigning, transferring, charging, delivering, or making over, of petitioning the court for protection from process.

Proviso.

Provisions of 3 G. 4, c. 39, extended to the assignees of insolvent petitioners.

XX. And be it enacted, That the provisions of an Act passed in the third year of the reign of his late Majesty King *George* the Fourth, intituled *An Act for preventing Frauds upon Creditors by secret Warrants of Attorney to confess Judgment*, shall extend to the assignee or assignees of every petitioner for protection from process whose estate shall, after the expiration of twenty-one days next after his execution of such warrant of attorney, or giving of such *cognovit actionem* as therein mentioned, be vested in an assignee or assignees under the provisions of the said recited Act and of this Act or of either of them, as if the said Act so intituled as aforesaid had been expressly herein enacted; and every such warrant of attorney, and judgment and execution thereon, and every such *cognovit actionem*, and judgment entered up thereon, and execution taken out on such judgment, as are declared by the said

last-mentioned Act to be fraudulent and void against the assignees mentioned therein, shall be deemed equally fraudulent and void against the assignee or assignees of the estate of such petitioner, and such assignee or assignees shall be entitled to recover back and receive, for the use of the creditors of such petitioner, all the monies levied and effects seized under or by virtue of any such judgment or execution.

Warrant of attorney and *cognovit actionem* not to be acted upon against property of insolvent petitioner after filing his petition.

XXI. And be it enacted, That in all cases where any petitioner for protection from process, whose estate shall have been vested in an assignee or assignees under the provisions of the said recited Act and of this Act or of either of them, shall have executed any warrant of attorney to confess judgment, or shall have given any *cognovit actionem* or bill of sale, whether for a valuable consideration or otherwise, no person shall, after the filing of the petition of such petitioner, avail himself of any execution issued or to be issued upon any judgment obtained or to be obtained upon such warrant of attorney or *cognovit actionem*, either by seizure and sale of the property of such petitioner or any part thereof, or by sale of such property theretofore seized, or any part thereof, or avail himself of such bill of sale, but that any person or persons to whom any sum or sums of money shall be due in respect of any such warrant of attorney or *cognovit actionem*, or of such bill of sale, shall and may be a creditor or creditors for the same under the said recited Act and this Act.

Final order to protect the person of the petitioner from process in respect of the debts or sums herein particularly mentioned.

XXII. And be it enacted, That the final order to be made under the provisions of the said Act as amended by this Act shall protect the person of the petitioner from being taken or detained under any process whatever in the cases hereinafter mentioned; (that is to say,) from all process in respect of the several debts and sums of money due or claimed to be due at the time of filing the petition from such petitioner to the several persons named in his schedule as creditors, or as claiming to be creditors for the same respectively, or for which such persons shall have given credit to such petitioner before the time of filing such petition, and which were not then payable, or in respect of the claims of any other persons not known to such petitioner at the time of making the final order, who may be indorsees or holders of any negotiable securities set forth in such schedule: Provided always, that every such final order may be made without specifying therein any such debt or debts, or sum or sums of money, or claims as aforesaid, or naming therein any such creditor or creditors as aforesaid; and such final order shall be in the form specified in schedule (A. No. 3.)

Specification of debts, &c. not necessary in final order.

If prisoner be detained for any claim in respect of which he is protected, commissioner may order his discharge.

XXIII. And be it enacted, That if any such petitioner, being a prisoner in execution at the time of filing his petition, shall be detained in prison for any debt or claim in respect of which he is protected from process by his final order, it shall be lawful for the commissioner to order any officer who shall have such petitioner in custody by virtue of such execution to discharge such petitioner without exacting any fee; and such officer shall be hereby indemnified for so doing.

If it appear to commissioner that any debts of the petitioner were contracted by fraud or breach of trust, &c. no day to be named for making the final order for protection: but if otherwise, a notice of such day to be given.

XXIV. Provided always and be it enacted, That if on the day for the first examination of the petitioner, or at any adjournment thereof, it shall appear to the commissioner that the debts of the petitioner, or any of them, were contracted by any manner of fraud or breach of trust, or by any prosecution whereby he had been convicted of any offence, or without having at the time a reasonable or probable expectation of being able to pay such debt or debts, or that such debts, or any of them, were contracted by reason of any judgment in any proceeding for breach of the revenue laws, or in any action for breach of promise of marriage, seduction, criminal conversation, libel, slander, assault, battery, malicious arrest, malicious suing out a fiat of bankruptcy, or malicious trespass, or that the petitioner has parted with any of his property since the presenting of his petition, the commissioner shall not be authorized in any such case to name any day for making such final order, or to renew such interim order; and in every such case wherein any such petitioner shall have been a prisoner in execution, and discharged out of custody by order of the commissioner under the provision herein in that behalf contained, such petitioner shall be remanded by an order of the commissioner to his former custody; but if none of the matters aforesaid shall so appear, and the commissioner shall be satisfied that the petitioner has made a full discovery of his estate, effects, debts, and credits, it shall then be lawful for the commissioner to cause notice to be given that on a certain day, to be named therein, he will proceed to make such final order, unless cause be shown to the contrary.

Sums payable by way of annuity to be deemed debts, and the annuitants to be creditors for the value thereof.

XXV. And be it enacted, That every sum of money which shall be payable, by way of annuity or otherwise, at any future time or times, by virtue of any bond, covenant, or other securities of any nature whatsoever, shall be deemed and taken to be debts within the meaning of the said recited Act and of this Act: Provided always, that every person who would be a creditor of any petitioner for protection from process for such sum or sums of money, if the same were presently due, shall be admissible as a cre-

ditor of such petitioner for the value, and no more, of such sum or sums of money so payable as aforesaid, which value the commissioner authorized to act in the matter of the petition shall upon application at any time made in that behalf, ascertain; regard being had to the original price given for such sum or sums of money, deducting therefrom such diminution in the value thereof as shall have been caused by the lapse of time since the grant thereof to the time of filing such petition; and such creditor shall be entitled in respect of such value to the benefit of all the provisions made for creditors by the said recited Act or by this Act, without prejudice nevertheless to the respective securities of such creditor, excepting as respects the effect of the final order which shall be obtained by such petitioner under the provisions of the said recited Act and of this Act.

Final order may extend to process for contempt in non-payment of money, and to costs incurred by creditor, but subject to taxation.

XXVI. Provided always, and be it enacted, That the final order for protection from process shall and may extend to all process issuing from any court for any contempt of court, ecclesiastical or civil, for nonpayment of money or of costs or expenses in any such court; and that in such case such final order shall be deemed to extend also to all costs which the petitioner would be liable to pay in consequence or by reason of such contempt, or on purging the same; and that every final order as to any debt or damages of any creditor of the petitioner shall be deemed to extend also to all costs incurred by such creditor before the filing of the petitioner's schedule in any action or suit brought by such creditor against the petitioner for the recovery of the same; and that all persons as to whose demands for any such costs, money, or expenses as aforesaid, the final order obtained by the petitioner shall be adjudged to extend, shall be deemed and taken to be creditors of such petitioner in respect thereof, and entitled to the benefit of all the provisions made for creditors by the said recited Act or by this Act; subject nevertheless to such ascertaining of the amount of the said demands as may be had by taxation or otherwise, and to such examination thereof as is herein provided in respect of all claims to a dividend of such petitioner's estate and effects.

Adjournment of consideration of final order.

XXVII. And be it enacted, That it shall be lawful for the commissioner, at the time appointed for making the final order for protection from process, or at any adjournment thereof, to adjourn the consideration of such final order *sine die*.

If final order refused, or adjourned *sine die*, the court, after the lapse of

XXVIII. And be it enacted, That if for any of the causes in that behalf aforesaid no day be named for making the final order, or if the consideration of such final order be adjourned *sine die*, or such final order be refused, the commissioner shall have the power, after the expiration of such

such time as it thinks just, having regard to the insolvency, and the conduct of the insolvent, may make an order to protect him from further imprisonment in respect of the debts, &c. mentioned in his schedule.

time subsequent to the filing of the petition as, having regard to all the circumstances of the insolvency, and the conduct of the petitioner as an insolvent debtor before and after his insolvency, the commissioner shall think just; and after hearing the petitioner or any of his creditors, or his or their counsel or attornies, to make an order to protect the petitioner from being taken or detained under any process whatever for or in respect of the several debts and sums of money due or claimed to be due at the time of filing his petition, from the said petitioner, to the several persons named in his schedule as creditors or as claiming to be creditors for the same respectively; or for which such persons shall have given credit to the said petitioner before the time of filing his petition, and which were not then payable, and as to the claims of all other persons not known to the said petitioner at the time of making such order, who may be indorsers or holders of any negotiable security set forth in his said schedule: Provided always, that no debtor shall be imprisoned on any process for more than twelve calendar months, for any debt contracted before filing his petition, in case the final order shall be refused or shall not be made, or in case the protecting order shall not be renewed.

Petitioner taken or detained after obtaining such order may be discharged.

XXIX. And be it enacted, That if such petitioner shall be taken or detained under any process whatever for any debt or claim in respect of which he is protected from process by such order as last aforesaid, it shall be lawful for the commissioner to order any officer who shall have such petitioner so in custody to discharge such petitioner therefrom, without exacting any fee; and such officer shall be hereby indemnified for so doing.

Where error in schedule without fraud, act to operate upon the actual amount of debt.

XXX. And whereas it may sometimes happen that a debt of, or claim upon, or balance due from a petitioner for protection from process may be specified in his schedule so sworn to as aforesaid at an amount which is not exactly the actual amount thereof, without any culpable negligence or fraud, or evil intention on the part of snch petitioner; be it enacted, That in such case the commissioner shall allow the schedule to be amended in that behalf; and in every case in which an amendment of the schedule shall be allowed, the said petitioner shall be entitled to every benefit and protection of the said recited Act and of this Act; and the creditor in that behalf shall be entitled to the benefit of all the provisions made for creditors by the said recited Act and by this Act in respect of the actual amount of such debt, claim, or balance, and neither more nor less than the same, to all intents and purposes, such error in the said schedule notwithstanding.

XXXI. And be it enacted, That whenever after an audit

there shall appear to the commissioner to be in the hands of the official assignee any balance wherewith a dividend may be made, proceedings shall be had forthwith under the direction of the commissioner, for making such dividend, and also, when it shall appear necessary, for correcting and ascertaining the list of creditors entitled to receive the same; and notice of any sitting of the court ordered to be held for such ascertaining of debts, or for an audit, or for declaring a dividend thereupon, or for all such purposes, shall be given for such time and in such manner as the commissioner shall from time to time direct; and such dividend shall be made amongst the creditors of the petitioner whose debts shall be admitted in his schedule sworn to by the petitioner, and amongst such other creditors (if any) who shall prove their debts in pursuance of any order of the commissioner to be made in that behalf, in proportion to the amount of the debts so admitted, or so admitted and proved, as the case may be: Provided always, that if the petitioner, or any creditor or assignee, shall object in whole or in part to any debt tendered to be so proved as aforesaid, or to any debt mentioned in the schedule of the petitioner, or if any person whose demand is stated in such schedule, but is not admitted therein to the extent of such demand, shall claim to be admitted as a creditor for the whole of such demand, or for more thereof than is so admitted, the said objections and claims shall, upon application duly made, be examined into by the commissioner, and the decision of the commissioner thereupon shall be conclusive with respect to the title of such creditor or creditors to his or their share of such dividend: Provided always, that if in any case it shall appear expedient, it shall be lawful at any time for the commissioner, by notice as may be directed in that behalf, to cause all or any of the creditors to prove their debts, in such manner as the commissioner shall require, and to decide upon such debts, and the right to receive dividends thereupon, and to do all things requisite thereto, as aforesaid.

How dividend to be made.

Notice of sittings.

Examination of objections and claims.

Commissioner may require proof of debts.

XXXII. And be it enacted, That if at the expiration of twelve calendar months from the filing of any petition for protection from process there shall remain any outstanding debts or other property due or belonging to the estate of the petitioner, which cannot, in the opinion of the commissioner, be collected and received, without unreasonable or inconvenient delay, it shall be lawful for the assignees, under the direction of the commissioner, to sell and assign such debts and other property in such manner as shall be ordered by the commissioner.

Outstanding debts, &c. may be sold by order of the commissioner.

XXXIII. And be it enacted, That no letter of attorney, affidavit, certificate, or other proceeding, instrument, or

Proceedings not liable to

stamp duty, nor sales to auction duty.

writing whatsoever in the matter of any petition for protection from process, nor any copy thereof, nor any advertisement inserted in any newspaper by the direction of any commissioner of the court of bankruptcy relating to any such matter, shall be liable to or charged with the payment of any stamp or other duty whatsoever; and that no sale of any real or personal estate of any such petitioner as aforesaid, for the benefit of his creditors, under the said recited Act or this Act, shall be liable to any auction duty: Provided always, that no such exemption from auction duty shall be allowed unless such sale shall be conducted by a licensed auctioneer, and such auctioneer shall at the time of passing his account thereof produce to the officer of excise a catalogue, signed and certified by the assignees by whose order such sale shall have been made, in manner and form required by the laws of excise.

Sum to be paid on prosecution of petition.

XXXIV. And be it enacted, That under every petition for protection from process after the passing of this Act in the court of bankruptcy in *London*, or in any district court of bankruptcy in the country, there shall be paid by the official assignee of the estate and effects of the petitioner into the bank of *England*, to the credit of the accountant in bankruptcy, to the account intituled "the secretary of bankrupts' account," a sum not less than one eighth of a pound *per centum* and not exceeding five pounds *per centum* on the gross produce from time to time of the petitioner's estate, such sum, within the limit aforesaid, and the time or times for payment thereof, to be fixed by the lord chancellor by any general order for those purposes, and to be applicable to all the purposes of the said account, and to be subject to the like orders as other monies directed to be paid in to the said account; and that it shall be lawful for the lord chancellor from time to time to lessen or increase such sum, within the limit aforesaid, as to the lord chancellor may seem just and reasonable, upon consideration of the amount from time to time standing to the said account, and of the claims from time to time chargeable thereupon.

Remuneration to official assignee.

XXXV. And be it enacted, That from and after the passing of this Act it shall be lawful for the commissioner authorized to act in the matter of any petition for protection from process to direct remuneration to the official assignee for his services in the matter of such petition, in like manner as in bankruptcy, but nevertheless so as such remuneration shall in no case exceed the rate of five pounds *per centum* on the sum received as produce of the property of the petitioner.

Fees.

XXXVI. And be it enacted, That no fee or gratuity shall be received or taken by the court of bankruptcy, or

any district court of bankruptcy, or any solicitor, auctioneer, broker, appraiser, accountant, messenger, or other officer of any such court, for any thing done or to be done in the matter of any such petition, of or from any person whomsoever, except as hereinbefore authorized, and except such fees as shall at any time be specified in a list thereof to be signed by the commissioners of the court of bankruptcy authorized to act in the prosecution of fiats in bankruptcy in *London*, or the major part of them, and such of the commissioners of the said court authorized to act in the prosecution of fiats in bankruptcy in the country as shall be nominated by the lord chancellor for that purpose, and to be approved of by the lord chancellor, a copy of which list shall be exposed to view in every such court.

Proceedings, or a copy thereof, duly signed, receivable in evidence.

XXXVII. And be it enacted, That any petition for protection from process, and any proceeding in the matter of such petition purporting to be signed by a commissioner of the court of bankruptcy, or a copy of such petition or other proceeding purporting to be so signed, shall in all cases be receivable in evidence of such proceedings having respectively taken place.

Rules and orders made under recited Act to be applicable to this Act.

XXXVIII. And be it enacted, That the rules and orders made by the judges and commissioners of the court of bankruptcy under the said recited act shall extend and be applicable to this act, except as otherwise provided by this Act: Provided always, that it shall be lawful for the commissioners of the court of bankruptcy acting in *London*, or the major part of them, and such of the commissioners of the said court acting in the country as shall be nominated by the lord chancellor for that purpose, from time to time, to alter or vary such rules and orders, or to make other rules and orders, to be approved of by the lord chancellor, for the better carrying into execution the said recited Act, as amended by this Act: Provided also, that any such rules and orders may be rescinded or varied as the lord chancellor shall direct.

Persons wilfully omitting any thing in schedule guilty of a misdemeanor, and liable to three years' imprisonment.

XXXIX. And be it enacted, That in case any petitioner for protection from process shall, with intention to defraud the creditors of such petitioner, wilfully and fraudulently omit in his schedule so sworn to as aforesaid, any property whatsoever, or retain or except out of such schedule as wearing apparel, bedding, or other necessaries, or working tools or implements, property of greater value than twenty pounds, every such person so offending, and any person aiding and assisting him to do the same, shall, upon being thereof convicted by due course of law, be adjudged guilty of a misdemeanor, and thereupon it shall be lawful for the court before whom such offender shall have been so tried

and convicted to sentence such offender to be imprisoned and kept to hard labour for any period not exceeding three years; and that in every indictment or information against any person for any offence under this Act it shall be sufficient to set forth the substance of the offence charged on the person offending, without setting forth the petition, or any proceeding whatever in the matter of such petition, except so much of the schedule of such petitioner as may be necessary for the purpose.

Indictment need only set out the substance of the offence charged.

Wilfully making a false oath or affirmation punishable as if guilty of perjury.

XL. And be it enacted, That if any person who shall make or take any oath or affirmation under or in pursuance of the said recited Act or of this Act shall therein be guilty of wilful falsehood, every such person, being duly convicted thereof, shall be subject to the same pains, penalties, and forfeitures to which persons convicted of wilful and corrupt perjury are or shall be subject to.

The lord chancellor may issue a fiat in bankruptcy against a traderhaving filed a declaration of insolvency, upon the petition of the trader himself.

XLI. And be it enacted, That the lord chancellor shall have power, upon petition made to him in writing by any trader who shall have filed a declaration of insolvency in mannner and form prescribed by the statute in that case made and provided relating to bankrupts, and upon payment of the like sum as is payable upon the granting a fiat upon the petition of a creditor, to be carried to and applicable to the purposes of the account in the bank of *England*, intituled "the secretary of bankrupts' account," to issue a fiat in bankruptcy against such trader, and to authorize the prosecution thereof in the court of bankruptcy in *London* or in any district court of bankruptcy; and that it shall and may be lawful for such court so authorized as aforesaid, upon the application of such trader, and upon proof of the trading and of the filing of such declaration, or upon the application of any creditor or creditors of such trader to such amount as by the said statute required for a petitioning creditor's debt, and upon proof of the matters requisite to support a fiat issued upon the petition of a creditor, to make the adjudication of bankruptcy under such fiat, and all further proceedings under such fiat shall be thenceforth prosecuted and carried on in like manner as if such fiat had been issued and adjudicated upon on the petition of a creditor of the bankrupt.

Lord chancellor may attach the countrycommissioners to districts.

XLII. And be it enacted, That it shall be lawful for the lord chancellor from time to time to attach the several commissioners of the court of bankruptcy appointed to act in the country to such districts described by Her Majesty, with the advice of her privy council, as he shall think fit.

Minute of petitions filed to be transmitted to cretary of nkrupts.

XLIII. And be it enacted, That a minute of every petition filed by any trader under the provisions of the said recited Act as amended by this Act shall be transmitted to the lord chancellor's secretary of bankrupts at such time

and in such manner and form as the lord chancellor shall direct.

Lord chancellor authorized to give necessary directions where courts shall sit.

XLIV. And whereas it may be expedient that the courts of bankruptcy should hold sittings in some matters of bankruptcy, or petitions for protection from process, at some place or places at which such courts have not hitherto been used to sit; be it enacted, That it shall be lawful for the lord chancellor, at any time or times whenever it shall appear to him under the circumstances of the case to be expedient, by any order or orders, to give the necessary directions in that behalf; and every commissioner and deputy registrar acting under any such order shall have paid to him his travelling and other expenses, in the same manner and out of the same fund as travelling and other expenses are directed to be paid by the Act passed in the sixth year of the reign of Her present Majesty, intituled *An Act for the Amendment of the Law of Bankruptcy*, to any commissioner or deputy registrar acting for or in aid of any commissioner or deputy registrar in cases provided for by such Act.

5 & 6 Vict. c. 122.

Lord chancellor empowered to appoint a taxing officer.

XLV. And be it enacted, That from and after the passing of this Act it shall be lawful for the lord chancellor to appoint some fit and proper person, such person being a barrister of not less than five years' standing at the bar, or who shall have practised as a pleader for not less than five years, or who shall have held the office of registrar or deputy registrar of the court of bankruptcy for not less than five years, or an admitted attorney of one of Her Majesty's superior courts at *Westminster*, or of Her Majesty's court of bankruptcy, in actual practice, of not less than five years' standing on the roll of such court or courts, to be the taxing officer of the court of bankruptcy, and to be called the master of the said court, at such salary, not exceeding one thousand two hundred pounds *per annum*, as the lord chancellor shall think fit, and to be entitled to an annuity not exceeding two-thirds of such salary, if and when such officer shall be affected with some permanent infirmity disabling him from the due execution of his office, such salary or annuity, as the case may be, to be charged upon and paid (without any deduction except the tax on income) out of the same fund and at the same times and in like manner as the salaries or annuities, as the case may be, of the registrars and deputy registrars of the said court; and as and when any vacancy shall occur in such office the same shall be supplied by the lord chancellor, by the appointment of some other fit and proper person of like qualifications as aforesaid; and every such taxing officer shall hold his office during his good behaviour, and shall discharge his

Tenure of office,

duties, and removal.

duties in person, except where otherwise provided by this Act, or by any regulation to be made under this Act, and may be removed from his office by the lord chancellor for misconduct; and the business to be transacted by such taxing officer, from and after the passing of this Act, shall be the swearing of such affidavits as may be sworn before any commissioner, registrar, or deputy registrar of the court of bankruptcy, and the taxing of such costs taxable by any court of bankruptcy by virtue of any statute now or hereafter to be in force as the lord chancellor shall from time to time by any general or other order direct, subject to review of the court authorized to tax the same; and the place, time, and manner in which the same shall be conducted shall be such as the lord chancellor shall by any such order direct.

General provision as to business of taxing officer.

Sum to be paid on the taxation of bills.

XLVI. And be it enacted, That upon the taxation by virtue of this Act of any bills of fees, charges or disbursements there shall be paid to the master such sum as the said master shall decide, not less than one shilling nor more than the sum of ten shillings, and also four-pence a folio, over and above the said sum of ten shillings, for every folio exceeding twenty folios of such bill.

Sums received by the master to be paid into the bank of England, after deducting such sum as the lord chancellor thinks fit for expenses of office.

XLVII. And be it enacted, That the sums so directed to be paid to and received by the master, and also all fees received by him for swearing affidavits, shall be paid by him, at such times as the lord chancellor shall by any order direct, into the bank of *England*, to the credit of the accountant in bankruptcy, to the account intituled "the secretary of bankrupts' account," after deducting thereout such sum as the lord chancellor shall think fit for the expenses of the said office; and all monies to be so paid in to the said account shall be applicable to all the purposes of the said account, and be subject to the like orders as other monies directed to be paid in to the said account.

In case of sickness or other reasonable cause, the duty of the master may be performed by deputy.

XLVIII. Provided always, and be it enacted, That if the said master shall from sickness or other unavoidable cause have occasion to be absent from the business of his office for a longer period than two months at any one time, then and in every such case it shall be lawful for the lord chancellor to give leave of absence, by his order in writing, to such master, and, if necessary, to appoint a deputy in his place during such time as shall be expressed in such order; and the name of such deputy, and the cause and time of such absence, shall be stated in such order; and such deputy may, if occasion require it, be changed by the lord chancellor; and every deputy so appointed shall be paid out of the said fund as the salary of the said master is chargeable upon such remuneration for his services as the

lord chancellor shall direct in such order, not being in any case less than one-third of the amount of the salary of such master.

Registrars, &c. who now receive the surplus of certain fees to be paid in future solely by salary.

XLIX. And whereas the registrars and deputy registrars of the court of bankruptcy, in addition to their respective salaries, are entitled to and now receive the surplus of certain fees authorized to be taken, and the payment or partial payment of such officers by fees has been found to be objectionable; be it enacted, That instead of the salaries and surplus fees heretofore received by such registrars and deputy registrars, there shall, from and after the eleventh day of *October* next, be paid to them by the governor and company of the bank of *England*, out of the fund placed to the credit of the accountant in bankruptcy, intituled "the secretary of bankrupts' account," by virtue of any order or orders of the lord chancellor to be from time to time made for that purpose, and without any draft from the accountant in bankruptcy, the several salaries hereinafter mentioned; that is to say, the net yearly sum of one thousand two hundred pounds to each of the registrars of the said court appointed under an Act passed in the reign of his late Majesty, intituled *An Act to establish a Court in Bankruptcy*, and his successors in such office; the net yearly sum of one thousand pounds to each deputy registrar of the said court, acting as such in the city of *London*, and his successors in such office; and the net yearly sum of eight hundred pounds to each deputy registrar of the said court, acting as such in the country, and his successors in such office; which salaries shall be free from all taxes, deductions and abatements whatsoever out of the same or any part thereof, (except the tax on income,) and shall be paid quarterly on the eleventh day of *January*, the eleventh day of *April*, the eleventh day of *July*, and the eleventh day of *October* in every year, by equal portions; and that if any person for the time being holding any of the said offices shall die, resign, or be removed from the same, the executor or administrator of the person so dying, or the person so resigning or being removed, shall be entitled to receive such proportionable part of his salary as shall have accrued during the time that such person shall have executed his office since the last payment; and that the successor of any such person so dying, resigning, or being removed as aforesaid, shall be entitled to receive such portion of his salary as shall be accruing or shall accrue from the day of such death, resignation, or removal.

1 & 2 W. 4, c. 56.

Fees to be accounted for.

L. And be it enacted, That from and after the eleventh day of *October* next all fees received and taken by or accounted for and paid over to the chief registrar of the

court of bankruptcy shall be paid by him, at such times as the lord chancellor shall by any order direct, into the bank of *England*, to the credit of the accountant in bankruptcy, to the account intituled "interest arising from the bankruptcy fund account," after deducting thereout such sum as the lord chancellor shall think fit for stationery and other incidental expenses of the offices of the chief registrar and the court of review; and that the salaries and sums of money to clerks, ushers, and other under officers of the court of bankruptcy heretofore paid by the chief registrar out of such fees shall thenceforth be paid by the governor and company of the bank of *England* out of the fund standing to such account, under such order or orders as may from time to time be made by the lord chancellor, but subject and without prejudice to the payment of all salaries and sums of money by any Act or Acts now in force directed or authorized to be paid thereout; and that on or before the first day of *March* one thousand eight hundred and forty-five, if Parliament be then sitting, or, if not, within fourteen days from the commencement of the then next session of parliament, there shall be laid before parliament by the said chief registrar a return, made up to the thirty-first day of *December* then last, of the total amount of all fees received by or accounted for and paid over to him, and of the payment over to the bank of *England* (such payment over to the bank of *England* to be certified by the accountant in bankruptcy), and that a like return shall be afterwards made by him annually at the same period for the year ending the thirty-first day of *December* then last.

Retiring pension to registrars.

LI. And be it enacted, That it shall be lawful for the lord chancellor, by any order or orders to be by him from time to time made on a petition to be presented to him for that purpose, to order (if he shall think fit) an annuity or clear yearly sum of money to be paid to any person executing the office of chief registrar, registrar, or deputy registrar of the court of bankruptcy, and acting in *London* or in the country, not exceeding two-thirds of the yearly salary which such person shall under this Act be entitled to at the time of presenting such petition, to be paid out of the interest and dividends that have arisen or may arise from the securities now or hereafter to be placed in the bank of *England* to the account, intituled "the bankruptcy fund account," (but subject and without prejudice as aforesaid,) if and when such person shall be afflicted with some permanent infirmity disabling him from the due execution of his office, and shall be desirous of resigning the same; and the annuity or yearly sum mentioned in such order or orders shall be paid by the governor

and company of the bank of *England*, out of the interest and dividends of the said securities (but subject and without prejudice as aforesaid) by equal quarterly payments, on the 5th day of *January*, the 5th day of *April*, the fifth day of *July*, and the tenth day of *October* in every year, to such person, from the period when he shall resign his said office, for the term of his life, free from taxes, except the tax on income.

Compensation to T. A. Warburton for having performed the duties of deputy registrar.

LII. And whereas one of the deputy registrars of the court of bankruptcy has since the twenty-first day of *November* one thousand eight hundred and forty-two performed the duties of taxing officer; and during that period the duties of deputy registrar were discharged by *Thomas Acton Warburton*, esquire, barrister-at-law; be it enacted, That out of the fund placed to the credit of the accountant in bankruptcy, intituled "the secretary of bankrupts' account," there shall be paid to the said *Thomas Acton Warburton*, by the governor and the company of the bank of *England*, by virtue of an order in writing of the lord chancellor, such sum of money, not exceeding eight hundred pounds, as the lord chancellor shall think reasonable.

Court may send a registrar to take proof of debts, &c. where expedient.

LIII. And be it enacted, That the court authorized to act in the prosecution of any fiat in bankruptcy, or any petition for protection from process, shall have power, whenever it shall seem expedient to such court, to direct a deputy registrar of such court to act in the prosecution of such fiat or petition for proof of debts and the examination of parties or witnesses on oath, or for either of such purposes, subject to such rules and regulations as the lord chancellor shall from time to time think fit to make in that behalf; the travelling expenses of such officer to be settled by such court, and paid out of the estate of the bankrupt or petitioner, as the case may be; and such officer so acting shall have and exercise the power vested in such court for proof of debts and examination of parties or witnesses, except the power of commitment: Provided always, that all such examinations of parties or witnesses shall be taken down in writing, and shall be annexed to and form part of the proceedings under such fiat or petition, as the case may be.

Examinations to be taken down.

Style of deputy registrars of the court of bankruptcy.

LIV. And be it enacted, That from and after the passing of this Act the deputy registrars of the court of bankruptcy and their successors, whether acting in *London* or in the country, shall be called the registrars of the said court.

Repealing provisions in 5 & 6 W. 4, c. 29, as to

LV. And whereas by an Act which passed in the sixth year of the reign of King *William* the Fourth, intituled *An Act for investing in Government Securities a Portion of the*

fees receivable by accountant in bankruptcy.

Cash lying unemployed in the Bank of England *belonging to Bankrupts' Estates, and applying the Interest thereon in Discharge of the Expenses of the Court of Bankruptcy; and for the Relief of the Suitors in the said Court; and for removing Doubts as to the Extent of the Powers of the Court of Review, and of the Subdivision Courts*, it is enacted, that the salaries hereinbefore provided shall be lieu of all fees and emoluments whatsoever, and that all such fees and emoluments, whether for commission, brokerage, or otherwise, as are now receivable by the said accountant general of the court of Chancery in matters of bankruptcy, shall, from and after the appointment of the said accountant in bankruptcy, be received by him and paid into the bank in the name of the said last-mentioned accountant, and be carried to the credit of the said accountant, to be intituled "interest arising from the bankruptcy fund account," and be applicable to all the purposes of the said account: And whereas the said enactment requires alteration; be it enacted, That the said enactment shall be repealed.

Salary of accountant.

LVI. And be it enacted, That the salary allowed to the accountant shall be in lieu of all fees and emoluments whatsoever, and that the accountant shall not, directly or indirectly, receive any sum either for commission, brokerage, or otherwise, but only the sum expressly allowed to him as his salary; that from henceforth the broker shall transact the brokerage business of the accountant's office upon such terms as the accountant and any two of the commissioners of the court of bankruptcy to be appointed by the lord chancellor shall, with the approbation of the lord chancellor, determine; and that the sum paid to the broker shall be charged by the accountant to the estate for which the investment or sale shall be made; and that when such sum to be paid to the broker shall be determined, it shall be lawful for the lord chancellor to direct the payment or any part of it to be made from such time retrospectively and prospectively as to him may seem just.

Arrest upon final process in an action for debt not exceeding 20*l*. and costs abolished.

LVII. An whereas it is expedient to limit the present power of arrest upon final process; be it enacted, That from and after the passing of this Act no person shall be taken or charged in execution upon any judgment obtained in any of Her Majesty's superior courts, or in any county court, court of requests, or other inferior court, in any action for the recovery of any debt wherein the sum recovered shall not exceed the sum of twenty pounds, exclusive of the costs recovered by such judgment.

Persons in execution at the time of passing this Act where he debt

LVIII. And be it enacted, That all persons in execution at the time of passing this Act, upon any judgment obtained in any of the courts aforesaid in any action for the recovery of any debt wherein the sum recovered shall not

exceed the sum of twenty pounds, exclusive of the costs recovered by such judgment, shall and may, upon the application of every such person or persons for that purpose, made at any time after the passing of this Act, to a judge of one of Her Majesty's superior courts of law at *Westminster*, or to the court in which such judgment shall have been obtained, to the satisfaction of such judge or court, be forthwith discharged out of custody as to such execution by an order of such judge or court: Provided always, that if it shall happen that any such discharge shall have been unduly or fraudulently obtained upon any false allegation of circumstances, which, if true, might have entitled the prisoner to be discharged by virtue of this Act, such satisfaction of the judge or court by whose order such prisoner shall have been so discharged, be liable to be again taken in execution, and remanded to his former custody by an order of such judge or court: Provided also, that no sheriff, gaoler, or other person whatsoever shall be liable as for the escape of any such prisoner in respect of his enlargement during such time as he shall have been at large by means of such his undue discharge as aforesaid: Provided also, that, for and notwithstanding the discharge of any debtor or debtors by an order of any such judge or court in manner aforesaid, the judgment whereupon any such debtor or debtors was or were taken or charged in execution shall nevertheless remain and continue in full force, to the intent and purpose that the judgment creditor or creditors may have and take remedy and execution upon every such judgment against the property and effects of any such debtor or debtors, in such manner and form as such creditor or creditors otherwise could or might have done in case such debtor or debtors had never been taken or charged in execution upon such judgment, and it shall be lawful for such creditor or creditors to have and take such remedy and execution.

shall not exceed 20*l.* and costs, shall be discharged on application to a judge.

Proviso for discharge fraudulently obtained.

Sheriffs, &c. not liable as for escape.

Judgment to remain in force notwithstanding the discharge of the debtor.

LIX. Provided always, and be it enacted, That if at any time it shall appear to the judge who shall try such cause, being either a judge of one of the superior courts, or a barrister or attorney-at-law, that the defendant, in incurring the debt or liability which may be the subject of demand, has obtained credit from the plaintiff under false pretences, or with a fraudulent intent, or has wilfully contracted such debt or liability without having at the same time a reasonable assurance of being able to pay or discharge the same, or shall have made or caused to be made any gift, delivery, or transfer of any personal property, or shall have removed or concealed the same with an intent to defraud his creditors or any of them, it shall be lawful for such judge, if

Power of imprisonment for fraud.

he shall think fit, to order that such defendant may be taken and detained in execution upon such judgment in like manner and for such time as he might have been if this Act had not been passed, or for any time not exceeding six calendar months in any case in which the time for which a person taken in execution under process issuing out of any such court could lawfully be detained in custody, according to the constitution of the said court, before the passing of this Act, is less than six calendar months, whether or not execution against the goods and chattels of such defendant shall have issued as herein-after provided.

Execution against the goods.

LX. And be it enacted, That whenever the judge of any such court shall have made an order for the payment of money, the amount shall be recoverable, in case of default or failure of payment thereof forthwith, or at the time or times and in the manner thereby directed, by execution against the goods and chattels of the party against whom such order shall be made; and the clerk of the said court, at the request of the party prosecuting such order, shall issue, under the seal of the court, a writ of *fieri facias*, as a warrant of execution to one of the bailiffs of the court, who by such warrant shall be empowered to levy, by distress and sale of the goods and chattels of such party within the jurisdiction of the said court, such sum of money as shall be so ordered, and also the costs of the execution; and all constables and other peace officers within their several jurisdictions shall aid in the execution of every such warrant.

Execution not to issue till after default in payment of instalment.

LXI. And be it enacted, That if the judge of any such court shall have made any order for payment of any sum of money by instalments, execution upon such order shall not issue against the party until after default in payment of some instalment according to such order, and execution or successive executions may then issue for the whole of the said sum of money and costs then remaining unpaid, or for each successive instalment and costs remaining from time to time unpaid, as the judge shall order, either at the time of making the original order, or at any subsequent time, under the seal of the court.

Power to suspend execution in certain cases.

LXII. And be it enacted, That if it shall at any time appear to the satisfaction of the judge of any such court, by the oath or affirmation of any person, or otherwise, that any defendant is unable, from sickness or unavoidable accident, to pay and discharge the debt or damages recovered against him, or any instalment thereof ordered to be paid as aforesaid, it shall be lawful for the judge, in his discretion, to suspend or stay any judgment, order, or execution given, made, or issued in such action for such time as the judge

shall think fit, and so from time to time until it shall appear, by the like proof as aforesaid, that such temporary cause of disability has ceased.

Execution to be suspended on payment of debt and costs.

LXIII. And be it enacted, That in or upon every such warrant of execution issued against the goods and chattels of any person whomsoever, the clerk of the court shall cause to be inserted or indorsed the sum of money and costs adjudged, with the increased costs allowed for such execution; and if the party against whom such execution shall be issued shall, before an actual sale of the goods and chattels, pay or cause to be paid or tendered unto the clerk of the said court, or to the bailiff holding the warrant of execution, such sum of money and costs as aforesaid, or such part thereof as the person entitled thereto shall agree to accept in full of his debt or damages and costs, together with such fees as shall have been lawfully incurred by him in the suit on which such execution issued, the execution shall be superseded.

Bailiffs made answerable for neglect to levy.

LXIV. And be it enacted, That in case any bailiff of any such court who shall be employed to levy any execution against goods and chattels shall, by wilful or notorious neglect or connivance or omission, lose the opportunity of levying any such execution, then, upon complaint of the party aggrieved by reason of such neglect, connivance, or omission, (and the fact alleged being proved to the satisfaction of the court out of which execution issued, on the oath of any credible witness,) the judge shall order such bailiff to pay such damages as it shall appear that the plaintiff has sustained thereby, not exceeding in any case the sum of money for which the said execution issued, and the bailiff shall be liable thereto; and upon demand made thereof, and on his refusal so to pay and satisfy the same, it may be recovered against him by such ways and means as are provided for the recovery of debts adjudged in the said court.

Remedies against bailiffs and other officers

LXV. And be it enacted, That if any bailiff or officer of any such court, acting under colour or pretence of the process of the said court, shall be charged with extortion or misconduct, or with not duly paying or accounting for any money levied by him under the authority of the court, it shall be lawful for the judge to inquire into such matter in a summary way, and for that purpose to summon and enforce the attendance of all necessary parties in like manner as the attendance of witnesses in any suit before him may be enforced, and to make such order thereupon for the repayment of any money extorted, or for the due payment of any money so levied as aforesaid, and for the payment of such damages and costs, as he shall think just; and in default of payment of any money so ordered to be paid the same may be recovered by such ways and means as are

provided for the recovery of debts adjudged in the said court.

Execution against the goods to be within the provisions of 7 & 8 Geo. 4, c. 17.

LXVI. And be it enacted, That every sale of goods which shall be taken in execution under process issuing from any such court for the recovery of small debts shall be taken to be within all the provisions of an Act passed in the eighth year of the reign of King *George* the Fourth, intituled *An Act to extend the Provisions of an Act made in the Fifty-seventh year of King* George *the Third, for regulating the Costs of certain Distresses.*

Landlord's lien for rent restrained.

LXVII. And be it enacted, That no landlord of any tenement let at a weekly rent shall have any claim or lien upon any goods taken in execution under the process of any court of law for more than four weeks' arrears of rent; and if such tenement shall be let for any other term less than a year the landlord shall not have any claim or lien on such goods for more than the arrears of rent accruing during four such terms or times of payment.

Claims as to goods taken in execution to be adjudicated in court.

LXVIII. And be it enacted, That if any claim shall be made to or in respect of any goods or chattels taken in execution under the process of any court for the recovery of small debts, or in respect of the proceeds or value thereof, by any landlord for rent, or by any person not being the party against whom such process has issued, it shall be lawful for the clerk of the court out of which such execution issued, upon application of the officer charged with the execution of such process, either before or after any action brought against such officer, to issue a summons calling before the court out of which such execution issued both the party issuing such process and the party making such claim, and thereupon any action which shall have been brought in any of Her Majesty's superior courts at *Westminster*, or in the court of common pleas at *Lancaster*, or in any local or inferior court, in respect of such claim, shall be stayed; and the court in which such action shall have been brought, or any judge thereof, on proof of the issue of such summons, and that the goods and chattels were so taken in execution, may order the party bringing such action to pay the costs of all proceedings had upon such action after the issue of such summons; and the judge of the court for the recovery of small debts out of which such execution issued shall adjudicate upon such claim, and make such order between the parties in respect thereof, and of the costs of the proceedings, as to him shall seem fit; and such order shall be enforced in like manner as any order made in any suit brought in such court.

Distress not unlawful for want of form.

LXIX. And be it enacted, That where any distress shall be made for any sum of money to be levied by virtue of this Act the distress itself shall not be deemed unlawful, nor the

party making the same be deemed a trespasser, on account of any defect or want of form in the information, summons, conviction, warrant of distress, or other proceeding relating thereto, nor shall the party distraining be deemed a trespasser from the beginning on account of any irregularity which shall afterwards be committed by the party so distraining, but the person aggrieved by such irregularity may recover full satisfaction for the special damage in an action upon the case.

Compensations to persons whose emoluments will be diminished.

LXX. And be it enacted, That every person entitled to any fees or salary for his services as a judge or other officer of any court, and every keeper or other officer of any debtors' prison, whose emoluments shall be diminished under the operation of this Act, so far as the same relates to or restrains imprisonment for debt, shall be entitled to make a claim for compensation to the commissioners of Her Majesty's treasury within twelve calendar months after the passing of this Act; and it shall be lawful for the said commissioners, in such manner as they shall think proper, to inquire what were the lawful fees and emoluments of the claimant or claimants before the passing of this Act in respect of which such compensation should be allowed, and how the same have been affected under this Act, by reason of the decrease of the number of causes or otherwise; and the commissioners in each case shall take into account the manner of appointment of every such judge, officer, and person, and his term or interest in his office or employment, and all other circumstances of the case, and shall award such gross or yearly sum, and for such time, as they shall think just to be awarded, upon consideration of the special circumstances of each case, and shall order and direct such compensation to be paid out of the consolidated fund of the United Kingdom of *Great Britain* and *Ireland*.

Inquiry into amount of compensation.

LXXI. And be it enacted, That the commissioners of Her Majesty's treasury shall have power from time to time to appoint such and so many persons to be commissioners for enabling them to ascertain the amount of compensation to be awarded under this Act as to them shall appear fit and necessary; and every such commissioner shall ascertain the gross and net annual value, according to a fair average of seven years before the passing of this Act, or, if the court shall not have been established with its present jurisdiction for seven years, then for the period during which the court shall have been established with its present jurisdiction, of any fees and emoluments the consideration of which shall be referred to him by the said commissioners of the treasury, and shall be empowered to inquire into and ascertain as well the legality as the amount of such fees and emoluments, and the manner of appointment of the person entitled

thereto, and his term or interest in his office or employment, and such other circumstances of the case as shall be necessary for ascertaining the amount of such compensation.

Appointment of assessors of inferior courts.

LXXII. And whereas there are divers courts of requests and other inferior courts for the recovery of small debts not presided over by a barrister or an attorney-at-law as judge or assessor; be it enacted, That it shall be lawful for the commissioners of any such court, if they shall think fit, with the approval of one of Her Majesty's principal secretaries of state, to appoint any person, being a barrister who shall have practised as a barrister for at least seven years then last past, or an attorney-at-law of one of the superior courts of common law at *Westminster*, or of the court of common pleas at *Lancaster*, who shall have practised as an attorney for at least ten years, to be the assessor of such court, and to direct what fees shall be paid to such assessor by the suitors of such court, not exceeding the fees in the schedule marked (B) hereunto annexed; and it shall be lawful for the said secretary of state to remove any such assessor for incompetency or misbehaviour: Provided always, that no assessor so to be appointed shall be deemed to be entitled to any compensation for the loss of his office, or for any diminution in the value thereof, by reason of the passing of any general Act for the recovery of small debts.

Construction of the Act.

LXXIII. And be it enacted, That in construing this Act the word "property" shall mean and include all the real and personal estate and effects of the petitioner within this realm and abroad, (except the wearing apparel, and such other articles of the value in that behalf aforesaid as may by this Act be exempted from the operation of the said recited Act and this Act,) and all the future estate, right, title, interest, and trust of such petitioner in or to any real or personal estate and effects within this realm or abroad, which such petitioner may purchase, or which may revert, descend, be devised or bequeathed, or come to him before he shall have obtained the final order, and all debts due or to be due to such petitioner before he shall have obtained such final order; and the words "oath" and "affidavit" shall mean and include affirmation, where by law such affirmation shall be required or may be taken in place of an oath; and all powers given to or duties directed to be performed by the lord chancellor may be performed by the lord keeper or lords commissioners of the great seal; and the word "judge," as applied to any court for the recovery of small debts, shall mean and include the county clerk, judge, steward, and assessor, or the person holding or presiding in such court; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing, and bodies corporate

as well as individuals; and every word importing the plural number shall extend and be applied to one person or thing as well as several persons or things; and every word importing the masculine gender only shall extend and be applied to a female as well as a male; (unless, in the cases above specified, a different construction shall be provided, or the construction be repugnant to the subject-matter or context;) and the provisions of the said recited Act and of this Act shall be construed by analogy to the law of bankruptcy, except where otherwise therein respectively expressed, and in the most beneficial manner for promoting the ends intended by the said recited Act and by this Act.

Recited Act not to be affected, except as herein provided.

LXXIV. And be it enacted, That nothing herein contained shall be construed to repeal, affect, or in any manner alter the provisions of the said recited Act, except so far as herein above expressly provided, or except so far as the provisions of the said recited Act may be inconsistent with or at variance with the provisions of this Act.

Act may be altered this Session.

LXXV. And be it enacted, That this Act may be altered, amended, or repealed by any Act to be passed in the present session of parliament.

SCHEDULE.

(A. No. 1.)

Form of Petition for protection from Process.

To the Court of Bankruptcy, London,

or

To the —— District Court of Bankruptcy.

The humble petition of ——

[Insert at full length the name, address, and quality of the petitioner, and also the description of the trade or business or (if more than one) trades or businesses which he carries or has carried on during his twelve months' residence within the district of the court.]

Showeth, That your petitioner is not a trader within the meaning of the statutes now in force relating to bankrupts.

[If a trader, strike out the word "not," and after the word "bankrupts" the words "but owing debts amounting in the whole to less than 300*l*."]

That your petitioner has resided twelve calendar months within the district of this honourable court; that is to say,

[Insert the places and periods of residence.]

That your petitioner has become indebted to divers creditors, whose names are inserted in the schedule (A) [*or, as the case may be,*] to this his petition annexed, and that he is unable to pay his debts in full.

That your petitioner has examined the said schedule, and that such schedule contains a full and true account of your petitioner's debts, and the claims against him, with the names of his creditors and claimants, and the dates of contracting the debts and claims severally, as nearly as such dates can be stated, the nature of the debts and claims, and securities (if any) given for the same, and that there is reasonable ground, in his belief, for disputing so much of the debts as are thereby mentioned as disputed, and also a true account of the nature and amount of his property, and an inventory of the same, and of the debts owing to him, with their dates, as nearly as such dates can be stated, and the names of his debtors, and the nature of the securities (if any) which he has for such debts; and that the said schedule doth also contain a balance sheet of so much of his receipts and expenditures, as is required by this honourable court in that behalf, and doth fully and truly describe the wearing apparel, bedding, and other such necessaries of your petitioner and his family, and his working tools and implements.

That your petitioner has not parted with or charged any of his property (except for the necessary support of himself and his family, and the necessary expenses (not exceeding £ ———) of his petition, or in the ordinary course of trade), at any time within three months of the date of filing this his petition, or at any time with a view to this petition.

That your petitioner is desirous that his estate should be administered under the protection and direction of this honourable court, and that he verily believes such estate is of the value of £——— at the least unincumbered, and beyond the value of his wearing apparel, and other matter, which your petitioner is authorized to except by this Act, and that the same is available for the benefit of his creditors.

* That your petitioner submits to this honourable court the proposal for the payment of his debts contained in the said schedule.

* Omit this paragraph if no special proposal.

That your petitioner is ready and willing to be examined from time to time touching his estate and effects, and to make a full and true disclosure and discovery of the same.

Your petitioner, therefore, prays such relief in the premises as by the statutes now in force for the relief of insolvent debtors may be adjudged by this honourable court.

And your petitioner shall ever pray, &c. &c.

Signed by the said petitioner on the ——— day of ——— 184 — in the presence of ——— of ——— attorney or agent in the matter of the said petition.

(A. No. 2.)

Affidavit verifying Petition and Schedule.

In the Court of Bankruptcy, London,

or

In the ——— District Court of Bankruptcy.

A. B. of ——— the petitioner named in the petition hereunto annexed [*if the petitioner affirm, alter accordingly*], maketh oath and saith, that the several allegations in the said petition, and the several matters contained in the schedule hereunto annexed, are true.

Sworn, &c.

(A. No. 3.)

Final order for protection from Process.

In the Court of Bankruptcy, London,

or

In the ——— District Court of Bankruptcy.

In the matter of the petition of ——— of ——— in the ——— of ———, an insolvent debtor, and not being a trader within the meaning of the statutes now in force relating to bankrupts [*or*, and being a trader within the meaning of the statutes now in force relating to bankrupts, but owing debts amounting in the whole to less than three hundred pounds].

Be it remembered, that the said ——— having presented his petition for protection from process to this honourable court, and such petition having been duly filed in court, and the said petitioner having duly appeared, and been examined touching his debts, estate, and effects, and it appearing to the undersigned commissioner that the said ——— by virtue of the statutes in that case made and provided, is entitled to the protection of his person from being taken or detained under any process whatever in respect of the several debts and claims herein-after mentioned, a final

order is hereby made to protect the person of the said ——— from being taken or detained under any process whatever in respect of the several debts and sums of money due or claimed to be due at the time of filing his petition from the said petitioner to the several persons named in his schedule as creditors or as claiming to be creditors for the same respectively, or for which such persons shall have given credit to the said petitioner before the time of filing his petition, and which were not then payable, and as to the claims of all other persons not known to the said petitioner at the time of making this order, who may be indorsers or holders of any negotiable security set forth in his said schedule: and it his hereby directed, that the proposal of the said petitioner, set forth in his petition, for the payment of his debts, be carried into effect in the following manner; that is to say,———.

Given under my hand, this ——— of ——— 184 .

(Signed)

——— Commissioner.

SCHEDULE (B.)

Assessors' Fees

	s.	*d.*
For every summons - - - -	1	0
For every hearing or trial - - -	2	6
For every order, decree, or judgment -	1	0

8 & 9 VICT. c. 127.

An Act for the better securing the Payment of Small Debts. [9th *August*, 1845.]

Whereas it is expedient and just to give creditors a further remedy for the recovery of debts due to them: Be it therefore enacted, by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, That if any person is or shall be indebted to any other in a sum not exceeding twenty pounds besides costs of suit, by force of any judgment obtained, or of any order for the payment thereof or of any costs in any court, which judgment or order shall have been obtained from any court of competent jurisdiction in *England*, it shall be lawful for the creditor so having obtained a judgment or order to obtain a summons from any commissioner of the court of Bankruptcy for the district in which such debtor shall reside or be, or from any court of requests or conscience, or inferior court of record for the recovery of debts, or other court for the recovery of small debts, within the jurisdiction of which such debtor shall reside or be, having a judge who shall be either a barrister-at-law, special pleader, or an attorney who shall have practised as an attorney for not less than ten years in one of Her Majesty's superior courts of common law at *Westminster*, which summons such commissioner of the court of Bankruptcy or such court shall be authorized and required to grant, according to the form in schedule (A.) hereunto annexed, upon the application of such creditor by any petition or note in writing, according to the form in schedule (B.) hereunto annexed; and the debtor, appearing before such commissioner or court at the time to be appointed in such summons, shall be examined by the said commissioner or court, and shall, if the creditor think fit, be interrogated before such commissioner or court by the creditor summoning him, touching the manner and time of his contracting his debt, the means or prospect of payment he then had, the property or means of payment he still hath or may have, the disposal he may have made of any property since contracting such debt; and such creditor shall also, if such commissioner or court shall think fit, be examined by the said commissioner or court touching his claim against the said debtor, and shall, if the debtor think fit, be interrogated before such commissioner or court by the said debtor touching the said claim against him; and it shall be lawful for such commissioner or court to make an order on the said debtor for the payment of his debt by instalments or otherwise; and in

Creditor obtaining judgment or order in respect of a debt not exceeding 20*l.* may summon the debtor before a commissioner of bankrupts or courts of requests, &c.

On debtor appearing he may be examined by the commissioner or court.

Creditor may also be examined.

If debtor fail

to attend, or to make satisfactory answer, or shall appear to have been guilty of fraud, &c. he may be committed.

case such debtor shall not attend as required by the said summons, and shall not allege a sufficient excuse for not attending, or shall if attending refuse to disclose his property, or his transactions respecting the same, or respecting the contracting of the debt, or shall not make answer thereof to the satisfaction of the commissioner or court, or shall appear to such commissioner or court to have been guilty of fraud in contracting the debt, or of having wilfully contracted it without reasonable prospect of being able to pay it, or of having concealed or made away with his property in order to defeat his creditors, or if he appears to have the means of paying the same by instalments or otherwise, and shall not pay the same at such times as the commissioner or court shall order, or as the court shall have ordered in which the original judgment shall have been obtained or order made, then in any of the said cases it shall be lawful for such commissioner or the judge of such court to order such debtor to be committed, for any time not exceeding forty days, to the common gaol wherein the debtors under judgment and in execution of the superior courts of justice may be confined within the county, city, borough, or place in which such debtor shall be resident, or to any other gaol or debtors' prison within the same county, city, borough, or place which shall by any declaration of one of Her Majesty's principal secretaries of state be allowed as a place of imprisonment under this Act, so long as such declaration shall remain in force and unrevoked.

How order shall be executed.

II. And be it enacted, That every bailiff and messenger to whom any such order shall be issued, or who shall be acting as an officer of the high bailiff of *Westminster* or *Southwark* in the execution of any such order issued to such high bailiff, shall be thereby empowered to take the body of the person against whom such order shall be made, and all constables and other peace officers within their several jurisdictions shall aid in the execution of every such order; and no protection, or interim or other order issuing out of any court of bankruptcy or for the relief of insolvent debtors, nor any certificate obtained after such order for imprisonment under this Act, shall be available to any debtor imprisoned under such order as aforesaid.

Imprisonment not to extinguish the debt; but on payment thereof, or of the instalment payable, and the costs, &c. the debtor to be discharged.

III. And be it declared and enacted, That no imprisonment under this Act shall in anywise operate as satisfaction or extinguishment of any debt or demand; but any person imprisoned under this Act, who shall have paid or satisfied the debt or demand, or the instalments thereof payable, and costs remaining due at the time of the order of imprisonment being made, and all subsequent costs, shall, upon entry of such payment indorsed on the order of imprisonment, signed by the plaintiff or his attorney, be discharged out of custody by

leave of a commissioner or judge of the court in which the order of imprisonment was made.

Certain courts to have the like powers in original suits.

IV. And be it enacted, That the judge of every court of requests or conscience, and of every inferior court of record for the recovery of debts, and of every other court for the recovery of small debts, of which the judge is a barrister-at-law or special pleader, or an attorney of ten years' standing of one of Her Majesty's superior courts of common law at *Westminster*, in which court proceedings shall be had for the recovery of any debt or demand within the jurisdiction of the said court, shall have the like powers, in the suit instituted for recovery of such debt or demand, of examining the parties to the suit, and, upon occasion of pronouncing judgment therein, if judgment be given for the plaintiff, shall have the like powers of further examining the parties, and, in the several cases hereinbefore specified, of committing the defendant to prison, which he might exercise under the provision hereinbefore contained, if judgment for such debt or demand had been obtained in his court, and the judgment creditor had obtained a summons for such defendant from the same court under this Act; and all the provisions of this Act shall be deemed to apply to such case as if such summons had been obtained.

Where several courts exist in the same town, &c. business not to be transferred from one to the other.

V. Provided always, and be it enacted, That in any city, town, or district wherein there are several courts for the recovery of small debts, neither of the said courts shall have any power under this Act in respect of any debt which shall have been sued for in the other of the said courts in the same city, town, or district, unless such other of the said courts shall not have a judge qualified as hereinbefore specified.

Application to commissioners, &c. need not be made by counsel or attorney. 5 & 6 Vict. c. 116.

VI. And be it declared and enacted, That in making application to any commissioner or court as aforesaid, or taking any proceedings under this Act, or under the Act of the last session of parliament, intituled *An Act to amend the Law of Insolvency, Bankruptcy, and Execution*, or under an Act made in the sixth year of the reign of Her Majesty, intituled *An Act for the Relief of Insolvent Debtors*, it shall not be requisite for any party, whether creditor or debtor, to employ either counsel or attorney or solicitor.

Affidavits in bankruptcy and insolvency may be sworn before keepers of prisons.

VII. And be it enacted, That any affidavit of any prisoner in any of Her Majesty's prisons or gaols in *England* to be used in matters of bankruptcy or insolvency, or under or by virtue of any statute relating to bankrupts or insolvent debtors, or of this Act, may be sworn before the visiting or other justice, or if within twelve hours none such shall attend, then by the principal keeper or gaoler of such prisons or gaols respectively, and they and he shall be respectively authorized and required to administer the oath upon any such affidavit or affidavits.

Actual necessaries

VIII. And whereas it is expedient to protect the actual necessaries of or belonging to judgment debtors from being

of judgment debtors not to be seized.

seized in execution; be it enacted, That from and after the passing of this Act the wearing apparel and bedding of any judgment debtor or his family, and the tools and implements of his trade, the value of such apparel, bedding, tools, and implements, not exceeding in the whole the value of five pounds, shall not be liable to seizure under any execution or order of any court against his goods and chattels.

Jurisdiction of courts may be altered.

IX. And be it enacted, That it shall be lawful for Her Majesty, with the advice of her privy council, to enlarge the jurisdiction of any such court of requests or conscience, or inferior court of record for the recovery of debts, or other court for the recovery of small debts, to all debts and demands, whether on balance of account or otherwise, or damage arising out of any express or implied agreement, not exceeding twenty pounds, and in such cases as Her Majesty, with the advice aforesaid, may think fit, to enlarge the district of any such court, or, where any part of the district of such court is comprised within the jurisdiction of any other like court, to contract the same, and also to make any alteration or regulation for the holding or sitting of any such court, both as to time and place, any thing in any Act constituting any such court to the contrary notwithstanding; and all powers and authorities now vested in any such court, the jurisdiction or district whereof shall be so enlarged, or the district whereof shall be so contracted, shall apply and extend to the jurisdiction or district given or limited under the powers of this Act, and that as fully as if such jurisdiction or district had been given by the Act or Acts establishing or regulating such court and its proceedings; provided always, that no such order shall take effect in respect of any court which shall not have a judge who is either a barrister-at-law or special pleader, or an attorney of one of Her Majesty's superior courts of common law at *Westminster* who shall have practised as an attorney for at least ten years; and in any court in which there shall be no judge qualified as aforesaid the person or persons to whom the appointment of judge, or, if there be no judge, to whom the appointment of any clerk of the court, belongs, or the majority of such persons, who shall be present at a meeting called for the purpose, shall within three calendar months next after the making of any such order, and also within three calendar months next after any vacancy of the said office of judge, appoint a judge, qualified as aforesaid, subject to the approval of Her Majesty, to be signified under the royal sign manual; and in default of any such appointment as aforesaid it shall be lawful for Her Majesty to appoint a judge, qualified as hereinbefore provided, for the court in which such default shall have been made; provided always, that no judge, clerk, or officer of any court whose emoluments shall be increased under this Act, nor any person or persons whose franchise or right of ap-

pointment to any office in any court shall become more valuable under this Act, shall be entitled to any compensation for any such increase of emoluments, or increased value of any such franchise or right of appointment, if the same, or the value of the same, shall be diminished or taken away by any alteration in the constitution of the said court, or otherwise, by Act of parliament: Provided also, that notice of the intention of Her Majesty, with the advice of her privy council, to take into consideration the expediency of making any such order, and of the time when the same will be considered, shall be given in the *London Gazette* one calendar month at least before the same shall be so considered.

Removal of judges of inferior courts for misbehaviour or incapacity.

X. And be it enacted, That every judge of any such court of requests or conscience, or inferior court of record for the recovery of debts, or other court for the recovery of small debts, shall be removable by the lord chancellor for misbehaviour or incapacity.

Who shall be competent to hold the court.

XI. And be it enacted, That in all cases of debts and demands which were not within the jurisdiction of the court before the passing of this Act, and also whenever the number of commissioners present at any court shall not be sufficient for the trial of causes according to the constitution of the court before the passing of this Act, the judge shall act alone, with all the powers of the court, and shall determine all questions, as well of fact as of law, in the causes which shall be brought before him.

Appointing of a deputy to act during the absence of the judge.

XII. And be it enacted, That in all cases of illness or unavoidable absence, the cause whereof shall be entered in the minutes of the court, it shall be lawful for the judge, or, in case of the inability of the judge, for the commissioners, or the person or persons to whom the appointment of the judge belongs, to appoint a deputy, qualified as is herein-before provided in the case of the judge, to act for him during such illness or unavoidable absence; and it shall also be lawful for the judge, with the approval of the person or persons to whom the appointment of judge belongs, and of one of Her Majesty's principal secretaries of state, to appoint a deputy, qualified as aforesaid, to act for him for any time or times not exceeding in the whole one calendar month in any consecutive period of twelve calendar months; and any deputy so appointed, while acting under such appointment, shall have all the powers and perform all the duties of such judge: Provided always, that, independently of the power herein contained, every judge shall have the same power of appointing a deputy or deputies to hold his court for all cases of debts and demands within the jurisdiction of the court as it was constituted before the passing of this Act which he has under the Act or Acts according to which the court is now constituted, and that such deputy or deputies, if qualified as is herein-before provided in the case of the judge or in the

case of any deputy appointed before the passing of this Act, if approved by one of Her Majesty's principal secretaries of state, shall have in all cases within the extended jurisdiction of the court the powers and privileges, and be subject to the same liabilities, and perform all the duties of such judge while acting under such appointment.

Execution of process in Westminster and Southwark.

XIII. And be it enacted, That until parliament shall otherwise direct, the execution of all process issuing out of any of the last-mentioned courts, the jurisdiction of which shall include the city and liberty of *Westminster*, or any part thereof, shall belong to the high bailiff of *Westminster*, and out of any court the jurisdiction of which shall include the borough of *Southwark*, or any part thereof, shall belong to the high bailiff of *Southwark*.

Power for judge to frame a table of fees.

XIV. And be it enacted, That the judge of any such court, the jurisdiction or district whereof shall be extended under the powers of this Act, shall, subject to the approval of one of Her Majesty's principal secretaries of state, frame a table of fees to be payable by the suitors of such court or courts in respect of every proceeding therein; and a table of such fees shall be put in some conspicuous place in the court-house and in the clerk's office; and the fees on every proceeding shall be paid, in the first instance, by the plaintiff or party on whose behalf such proceeding is to be had, on or before such proceeding; and all such fees shall be received by the clerk or clerks of such courts, who shall account to the other officers of such court for the amount or proportion thereof which shall be payable to them respectively, and shall also in the month of *March* in every year render to one of Her Majesty's principal secretaries of state an account of all such fees which shall have been received in the year ending on the last day of *December* then next preceding: Provided always, that it shall be lawful for the secretary of state to lessen the amount of the fees to be taken in any one or more of the courts the jurisdiction or district whereof shall be extended as aforesaid, in such manner as to him shall seem fit, and again to increase such fees, so that the scale of fees given in the schedule to this Act marked (C.) be not in any case surpassed: Provided also, that in all cases where any judge, clerk, or other officer of any such court shall have been paid by salary instead of fees, such judge, clerk or other officer shall continue to receive such salary in respect of the business now within the jurisdiction of such court, and, in respect of the business under the powers of this Act, such fees applicable thereto as are set out in the said schedule (C.), or such additional salary instead of such fees as the secretary of state shall direct; and all sums payable in the name of fees to any such judge, clerk, or other officer, over and above the amount of such salary, shall be applicable for such purposes and in the manner prescribed by the Act or Acts of Parliament under

which such court is constituted; and that in awarding compensation to any judge, clerk, or officer of any such court under the provisions of the said Act of the last session of parliament, account shall be taken of the fees and emoluments to which he shall become entitled under this Act, and any increase of his fees and emoluments under this Act shall go in diminution of the amount to be awarded to him for such compensation.

Fees in courts of bankruptcy.

XV. And be it enacted, That the registrars of the court of Bankruptcy shall be entitled to take the fees on every proceeding had under this Act before or under the authority of any commissioner of the court of Bankruptcy in his district which are specified in the schedule marked (D.) hereunto annexed, and the messengers and ushers of the court of Bankruptcy shall be severally entitled to have the same fees which are provided as the bailiffs' and serjeants' fees in the schedule (C.) hereunto annexed, subject to such alterations as may be made in the said several fees by the court of Bankruptcy, so as not to exceed the scales of fees herein provided.

Fees, &c. payable under any existing Acts not to be affected.

XVI. Provided always, and be it enacted, That nothing hereinbefore contained shall extend to or affect any fees or salary payable by virtue of any existing Act or Acts for business or proceedings in any court for the recovery of small debts, except such business or proceedings as shall be had under or by virtue of this Act; but it shall be lawful for the judge of any court, with the approval of one of Her Majesty's principal secretaries of state, to alter the fees receivable under the Act or Acts under which his court is now constituted, but not so as to exceed the scale of fees given by such Act or Acts respectively.

Poundage to be demanded from suitors upon sums claimed.

XVII. And be it enacted, That for raising a fund for providing a court-house and offices for any court of requests, or other court for the recovery of small debts, and for other purposes hereinafter mentioned, the clerk or clerks of any such court in which and while it shall be necessary to raise such fund shall demand and receive from the plaintiff in every suit brought in that court, before he shall issue any summons in that suit, the sum of sixpence when the debt or damage claimed shall not exceed twenty shillings, and for every claim exceeding twenty shillings one fortieth part thereof (neglecting any sum less than three-pence in estimating such fortieth part), or other such sum, in either case not exceeding the rates hereinbefore mentioned, as the secretary of state from time to time shall order, which sum shall be paid in all cases in the first instance by the plaintiff upon suit brought in such court, and shall be considered as costs in the cause; and the clerk or clerks of the court shall keep an account of all monies so paid to him or them, and shall account for the same to the judge of such court for the time being, and the amount thereof shall accumulate, to form a general fund for such court, and

shall be applied in providing a court-house and offices, or in defraying the rent and taxes, stationery, and other necessary expenses of holding and carrying on the business of such court, in such manner as the court for the time being, with the approval of the secretary of state, shall direct.

Summonses to witnesses.

XVIII. And be it enacted, That either of the parties to the suit or any other proceeding before any such commissioner or in any such court may obtain summonses to witnesses, to be served by a messenger or bailiff, with or without a clause requiring the production of books and writings in their possession or control, and in any such summons any number of names may be inserted; and every person on whom any such summons shall be personally served within the jurisdiction of the court, and to whom at the same time payment or tender of his expenses shall have been made, on such scale of allowance as shall be from time to time settled by the court of bankruptcy or judge of any such court as aforesaid, as the case may be, with the approval of one of Her Majesty's principal secretaries of state, and who shall refuse or neglect, without sufficient cause, to appear, or to produce any books or writings required by such summons to be produced, and also every person present in court who shall be required to give evidence, and who shall refuse to be sworn and give evidence, shall forfeit and pay such fine not exceeding five pounds as the commissioner or judge shall set on him, and payment of such fine shall be enforced in like manner as payment of any debt recovered by judgment of any court of competent jurisdiction; and the whole or any part of such fine, in the discretion of the judge, after deducting the cost, shall be applicable toward indemnifying the party injured by such refusal or neglect, and the remainder thereof shall be applicable to the expenses of the court in which the fine was imposed.

Lists of unclaimed suitors' money to be made out and put up in the court.

XIX. And be it enacted, That the clerk or clerks of every such court shall in the month of *March* in each year make out a correct list of all sums of money belonging to suitors in the court which shall have been paid into court, and which shall have remained unclaimed for the space of twelve calendar months before the first day of the month of *January*, specifying the names of the parties for whom or on whose account the same were so paid into court; and a copy of such list shall be put up and remain during court hours in some conspicuous part of the court-house, and at all times in the clerk's office.

All suitors' money paid into court and unclaimed for six years, to go into the court fund.

XX. And be it enacted, That all sums of money which shall have been paid into any such court to the use of any suitor or suitors thereof, and which shall have remained unclaimed for the period of six years before the passing of this Act, and which are now in the hands of any commissioner, trustee, judge, or officer of such court, or otherwise held in trust for such suitors, and all further sums of money which shall hereafter be paid into any such court to the use of any suitor

or suitors thereof, shall, if unclaimed for the period of six years after the same shall have been so paid into court, vest in and belong to the judge or judge and commissioners of such court for the time being, in trust for the general purposes of such court, and shall form a general fund, for the payment of all debts due on behalf of the court, and the necessary expenses of holding or carrying on the business of such court.

Power to remove suits exceeding 10*l.* into superior courts.

XXI. And be it enacted, That any suit to be instituted in any such court, wherein the claim or demand shall exceed the sum of ten pounds, shall be removable by *certiorari* or otherwise into any of Her Majesty's superior courts of common law at *Westminster*, or into the court of Common Pleas at *Lancaster*, by leave of a judge of any one of the said courts, and upon such terms as he shall order.

Power to execute warrants and levy executions out of jurisdiction.

XXII. And be it enacted, That in all cases where final judgment shall have been obtained in any such court, and a warrant or execution shall have issued against the goods and chattels of the defendant, or an order for his commitment shall have been made under this Act, and the defendant, or his goods and chattels, shall be out of the jurisdiction of such court, it shall be lawful for the officer charged with such warrant, execution, or order of commitment to apply to any justice of the peace acting for any county, division, or place in which the defendant, or his goods and chattels, shall then be, upon proof being made upon oath (which oath such justice shall be empowered to administer) that the person or goods and chattels of such defendant is or are believed to be within the county, division, or place where such justice of the peace shall act, such justice of the peace shall sign or endorse his name upon the said warrant, execution, or order of commitment, and thereupon the said officer charged therewith shall take and seize the person or the goods and chattels of the defendant, wheresoever the same shall be found within the county, division, or place for which such justice of the peace shall act, and all constables and other peace officers shall be aiding and assisting within their respective districts in the execution of the said warrants, executions, or orders.

Powers of 7 & 8 Vict. c. 96, applicable to this Act.

XXIII. And be it declared and enacted, That all the enactments of the said Act of the last session of parliament, and of the several Acts under which the said several courts are now held or constituted, shall within their several districts be deemed to apply to every proceeding under this Act, so far as the same are applicable, and not repugnant to the provisions of this Act.

Interpretation of terms in the Act.

XXIV. And be it enacted, That in the construction of this Act the word "judge" shall be construed to include every person, being either a barrister-at-law or a special pleader, or an attorney of one of Her Majesty's superior courts of com-

mon law at *Westminster* who shall have practised as an attorney for at least ten years in one of Her Majesty's superior courts of common law at *Westminster*, who, according to the constitution of the court, presides in any such court as aforesaid, or acts as judge or assessor therein, whether by the title of judge, or barrister, or county clerk, assessor, or steward or deputy steward, or by any other style or title whatsoever; and the word "person" shall include a body corporate; and every word importing the singular number or masculine gender shall include also several persons or things, and females as well as males, unless the context shall require another construction.

Act to apply only to England.

XXV. And be it enacted, that this Act shall apply only to *England*.

SCHEDULES TO WHICH THIS ACT REFERS.

SCHEDULE (A.)

You are hereby required to appear before [*set forth the court's style*] at ———, on the ——— day of ——— next, to answer such questions as may be put to you touching the not having paid to *A. B.* of ——— the sum of £———, recovered in a certain judgment [*or* order] of [*set forth the style or other sufficient description of the court that gave the judgment or made the order.*]

To *C. D.* of ———.

By order of the court,
(Signed) ———.

SCHEDULE (B.)

Be pleased to summon *C. D.* of ——— to answer touching the debts due to me by the judgment [*or* order] of the court of [*set forth the style or sufficient description of the court which gave the judgment or made the order*] on my behalf.

(Signed) [*Party's Name*] of ———.

BIBLIOTHECA REGIA MONACENSIS.

SCHEDULE (C.)

JUDGE'S FEES.

	On Demands not exceeding 40s.		On Demands not exceeding £5.		On Demands exceeding £5, and not exceeding £10.		On Demands exceeding £10.	
	s.	*d.*	*s.*	*d.*	*s.*	*d.*	*s.*	*d.*
For every summons - - - - -	0	6	1	0	2	0	3	0
For every hearing or trial - - - -	2	0	2	6	7	6	10	0

SCHEDULE (C.)—*continued.*

CLERK'S FEES.	On Demands not exceeding 40s.		On Demands exceeding 40s. and not exceeding £5.		On Demands exceeding £5, and not exceeding £10.		On Demands exceeding £10.	
	s.	*d.*	*s.*	*d.*	*s.*	*d.*	*s.*	*d.*
For entering every plaint, petition, or note -	0	6	1	0	1	6	2	0
Issuing every summons or subpœna - -	0	6	1	0	1	6	2	0
Every hearing or trial - - - - -	1	0	1	6	2	0	2	6
Adjournment of any cause or hearing - -	0	3	0	4	0	6	0	8
Swearing any witness, plaintiff, or defendant	0	4	0	6	0	8	1	0
Entering and drawing up every judgment, decree, or order - - - - -	0	6	1	0	1	6	2	0
Copy of every order or judgment - -	0	3	0	6	1	0	1	3
Every nonsuit - - - - - -	0	6	1	0	2	0	2	6
Paying money into court, and entering same in books - - - - - -	0	3	0	4	0	6	0	8
Every receipt on payment of money out of court, exclusive of stamp - - -	0	4	0	6	1	0	1	3
Issuing every attachment, precept, order, or execution - - - - - -	1	0	1	6	2	6	3	0
Taking recognizance of security for costs -	-	-	-	-	2	6	3	0
Taxing costs - - - - - -	1	0	1	0	2	0	3	0

BAILIFF'S AND SERJEANT'S FEES.	On Demands not exceeding 40s.		On Demands exceeding 40s. and not exceeding £5.		On Demands exceeding £5, and not exceeding £10.		On Demands exceeding £10.	
	s.	*d.*	*s.*	*d.*	*s.*	*d.*	*s.*	*d.*
For calling every plaintiff or defendant - -	0	2	0	3	0	5	0	6
For serving every summons, order, or subpœna within one mile of the court-house -	0	4	0	6	0	10	1	0
If above one mile, then extra for every mile not exceeding seven miles from the court-house - - - -	0	2	0	3	0	4	0	4
For the execution of any warrant, precept, or attachment against the goods or body -	1	0	1	6	2	6	3	0
If above one mile, then extra for every mile not exceeding seven miles from the court-house - - - -	0	2	0	3	0	4	0	4
If an assistant-serjeant should be necessary, in the judgment of the court, then for assistant	0	6	1	0	2	0	2	6
If above one mile, then extra for every mile not exceeding seven miles from the court-house - - - -	0	2	0	3	0	4	0	4
For carrying every plaintiff, defendant, or delinquent to prison (including all expenses and assistants,) for every mile - - -	0	6	0	6	0	6	0	6

SCHEDULE (D.)

Fees to be taken by the Registrars of the Courts of Bankruptcy.

	If Debt is under £5.		If £5, and under £10.		£10, and not exceeding £20.	
	s.	*d.*	*s.*	*d.*	*s.*	*d.*
On filing application for summons - - - -	0	6	0	9	1	0
For summons - - - - - - -	0	6	0	9	1	0
Order - - - - - - - - -	1	0	1	6	2	0
For every examination - - - - - -	0	6	0	9	1	0
For every warrant - - - - - - -	0	6	0	9	1	0
On filing affidavits or other documents - - -	0	6	0	9	1	0
For every search - - - - - - -	0	6	0	9	1	0
For registering every order - - - - -	0	6	0	9	1	0
For copies of any documents filed, 1½d. per folio of ninety words.						

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